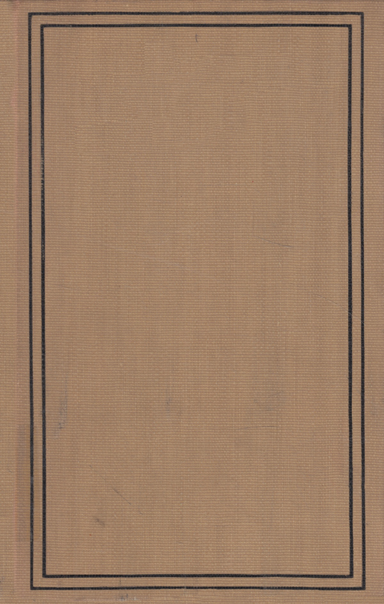








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

APRIL 1, 1942, TO JUNE 30, 1942

WITH

REPORT OF
DECISIONS OF THE SUPREME COURT
IN COURT OF CLAIMS CASES

REPORTED BY
JAMES A. HOYT

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*Judge Green recalled to sit, hear, and determine all questions which may arise in cases heard by him.

[1]Appointed March 28, 1942. Mr. Evans took the oath of office and entered upon his duties April 1, 1942.

[2]Appointed March 28, 1942. Mr. Cowen took the oath of office and entered upon his duties May 1, 1942.



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LEGISLATION RELATING TO THE COURT OF CLAIMS

[Private Law 447—77th Congress]

[Chapter 398—2d Session]

[S. 221]

AN ACT CONFERRING JURISDICTION UPON THE COURT OF CLAIMS OF THE UNITED STATES TO HEAR, DETERMINE, AND RENDER JUDGMENT UPON THE CLAIMS OF THE BEACON OYSTER COMPANY, THE POINT WHARF OYSTER COMPANY, AND B. J. ROOKS AND SON

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, as to liability of the United States, and render judgment upon the claims of the Beacon Oyster Company, and the Point Wharf Oyster Company, both of Wickford, Rhode Island, for compensation for damages sustained by said claimants by reason of the injury to their oyster beds at Quonset Point, Rhode Island, as a result of dredging operations carried out in behalf of the United States in connection with the establishment of the naval air station at Quonset Point in the year 1940, and upon the claim of B. J. Rooks and Son, of Warren, Rhode Island, for compensation for damages done their oyster beds at Sabins Point, Rhode Island, as a result of dredging operations carried on by the United States Army Engineers in the year 1939: *Provided*, That suit hereunder shall be instituted within six months from the date of the approval of this Act, and proceedings therein shall be had in the same manner as in the case of claims over which the Court of Claims has jurisdiction, by virtue of section 145 of the Judicial Code, as amended.

Approved, June 9, 1942.

[Private Law 449—77th Congress]

[Chapter 400—2d Session]

[S. 1563]

AN ACT CONFERRING JURISDICTION UPON THE COURT OF CLAIMS OF THE UNITED STATES TO HEAR, DETERMINE, AND RENDER JUDGMENT UPON THE CLAIM OF ALBERT M. HOWARD

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment, as if the United States were suable in tort, upon the claim of Albert M. Howard, of Wheaton, Illinois, for personal injuries and property damage sustained by the said Albert M. Howard when a mail truck or vehicle operated by the Post Office Department through its agents, servants, and employees collided with an automobile in which he was riding on February 25, 1939, near the junction of United States Highway Numbered 330 (commonly known at the point of collision as Roosevelt Road) and Fifth Avenue, Maywood, Illinois: *Provided,* That the judgment shall not exceed the sum of $7,500.

Approved, June 9, 1942.

CASES DECIDED

IN

THE COURT OF CLAIMS

April 1, 1942, to June 30, 1942.

THE PENKER CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43277. Decided February 2, 1942. Plaintiff's motion for new trial overruled May 4, 1942]

On the Proofs

Government contract; finality of decision of contracting officer; jurisdiction of court to review.—Provisions of a contract preventing resort to the courts to determine rights of the parties are to be strictly construed against excluding this right; this remedy will not be denied unless the language of the contract makes such conclusion inescapable. *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298, and other cases cited.

Same.—Provision of contract giving contracting officer right to settle disputes arising under contract must be narrowly limited. Such provision did not give contracting officer right to decide amount due contractor, except insofar as his decision of the amount of work required by the contract determined this question. Such provision did give him authority to interpret the provisions of the contract, to determine the work required thereby to be done, the fitness of the material, and the sufficiency of the workmanship.

If contracting officer acts contrary to the mandate of the contract, his decision must be set aside.

Same; extra work.—Contracting officer not authorized to determine amount to be paid for extra work not ordered as required by contract, but accepted by defendant.

Same; deduction from contract price because actual cost of doing work below estimated cost.—Where the contract was for a lump sum, the defendant is not authorized to deduct from the amount to be paid the difference between the actual cost and the cost estimated by the contractor.

Same; finality of decision of department head on appeal.—Where an appeal from the decision of a contracting officer was taken to the head of the department, and where such appeal was given only cursory consideration, if any, by the contracting officer's superiors, it is *held* that the provision for appeal has been violated and that the decision may be reviewed by the court. On appeal the dispute must be given genuine consideration by the contracting officer's superiors, somewhat approaching consideration that would be given by a court of justice.

Same; effect of decision of contracting officer where provson for appeal has not been complied with.—Although provision for appeal has not been complied with, the decision of the contracting officer on the dispute is presumptively correct and should not be set aside unless clearly erroneous.

Same; labor preferences.—Where contract provided that labor was to be secured, first, from the political subdivision in which the work was to be done, and, second, from the State, territory or district in which the work was to be done, and the contractor was restricted to the county in which the work was done and to two towns in adjoining counties and was not allowed to secure labor from the State at large, it was *held* that the contract had been violated by the defendant and that the contractor was entitled to recover damages resulting therefrom.

Same; damages, speculative and remote.—Where it is speculative or conjectural as to whether or not breach of contract caused the damages suffered, the plaintiff is not entitled to recover; but where it is established that the wrongful act caused the damage, but the amount of the damage cannot be definitely ascertained, the plaintiff is entitled to recover such sum as the court concludes reasonably results from the wrongful act. *The F. Mansfield & Sons Co.* v. *United States*, 94 C. Cls. pp. 397, 420–421, and cases there cited; *Palmer* v. *Connecticut Railway Co.*, 311 U. S. 544, 560; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562, 563.

The Reporter's statement of the case:

Mr. John W. Gaskins and *Mr. Jerome Goldman* for the plaintiff. *King & King* were on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The Penker Construction Company, plaintiff, is a corporation organized under the laws of the State of Ohio, with its principal office in the city of Cincinnati, Ohio. In 1923

it succeeded a partnership that had existed since 1880. Since its incorporation it has been engaged in general construction work and has performed an average of more than one million dollars' worth of such work per year.

2. Pursuant to an invitation of defendant, dated February 13, 1934, plaintiff on March 1, 1934, submitted its bid for the construction and erection of sixty-eight (68) buildings to be used as officers' quarters at Patterson Field, Fairfield, Ohio. Patterson Field is located in the northwestern section of Greene County, Ohio, and is from 8 to 15 miles from Dayton, Montgomery County, Ohio, Springfield, Clark County, Ohio, and Xenia, Greene County, Ohio.

On March 8, 1934, plaintiff and defendant entered into a contract, wherein, for a consideration of $1,018,300.00, plaintiff agreed to furnish all labor and materials and to perform all work required for the construction of officers' quarters at Patterson Field, according to accompanying plans and specifications, all of which are of record as plaintiff's exhibits "F," "B," and "C."

On March 18, 1934 plaintiff began its work, and agreed to complete it by June 1, 1935, which time was later changed to July 1, 1935. Certain changes and modifications were made in the contract which, according to the defendant's contention, increased the contract price to $1,022,881.21, which sum has been paid to the plaintiff. But the plaintiff claims it is entitled to additional sums on account of wrongful deductions and alleged breaches of the agreement by the defendant, which claims are hereinafter set forth under the headings, "First cause of action" to and including "Fifteenth cause of action."

3. The work consisted of the erection of 68 buildings, providing 91 sets of officers' quarters. A number of these buildings were quite similar, calling for repetition of identical labor operations, and permitting the use of prefabricated materials of identical pattern. The work presented an opportunity for the application of "mass production methods of construction," which plaintiff employed. It divided the buildings into three main groups, placing buildings of a similar nature in each of these groups.

A general superintendent supervised the entire work. An assistant superintendent was placed in charge of each of the

three main groups of buildings. There were several "expediters" whose duty it was to supervise and schedule the delivery of materials and check upon the work in an effort to secure proper coordination. Under each assistant superintendent there were a number of foremen in charge of the various construction crews. There was one person in a supervisory capacity for every eleven men employed on the job.

The work to be performed in each of the three main groups of buildings was assigned to separate crews of workmen, each crew performing the same operation in all of the buildings of that main group. Plaintiff planned its work in a manner to permit each superintendent to cover his area and visit each building several times a day.

4. Plaintiff located and operated a mill on a railroad siding at a distance of one-half mile from the site of the work. Its material was delivered in carload lots to the mill by a conveyor belt, where it was prefabricated according to pattern. Plaintiff also had at the site of the work a power-driven pipe-cutting machine. The handling and prefabrication of materials in this manner was designed to lower both the time of manufacture and the cost.

Plaintiff's mass-production method was devised to obtain greater efficiency on the part of the mechanics by restricting them to the same operation in one group of similarly constructed houses, thus increasing their familiarity with and their skill in the performance of certain operations.

5. The contract provides, in part, as follows:

> ART. 15. *Disputes*.—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

6. The specifications, under "General Conditions," provide:

> G. C. 10. *Interpretation of contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.
>
> * * * * *
>
> G. C. 19. *Drawings and specifications cooperative.*—The drawings and specifications shall be considered as cooperative and work and material called for by one and not mentioned in the other shall be done or furnished in as faithful and thorough a manner as though fully covered by both.
>
> G. C. 20. *Complete work required.*—It is intended that the drawings and specifications include everything requisite and necessary to properly finish the entire work, notwithstanding every item necessarily involved is not particularly mentioned; all work when finished shall be delivered in a complete and undamaged state.
>
> G. C. 21. *Discrepancies.*—Where no figures or memoranda are given, the drawings shall be accurately followed according to scale. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the C. Q. M., without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk; and in the settlement of any complications arising from such adjustment the Contractor shall bear all extra expense involved. In case of difference between drawings and specifications, the specifications shall govern.
>
> * * * * *
>
> G. C. 24. *Laying out work.*—The Contractor must lay out his own work; he shall be responsible for measurements; he must exercise proper precaution to verify the figures before laying out the work and will be held responsible for any errors therein that otherwise might have been avoided. He shall promptly inform the C. Q. M. of any errors or discrepancies he may discover in the drawings and specifications, in order that the proper corrections may be made and understood. The

work must be carried on systematically and so managed at all times as to secure rapid progress and avoid annoyance and inconvenience.

* * * * *

G. C. 28. *Inspection and acceptance—or rejection of work.*—The Contractor must understand that the materials delivered and labor furnished by him at any and all times during the progress of the work and prior to final acceptance of and payment for same, shall be subject to the inspection of the C. Q. M., or other authorized agent of the U. S., with the full right to accept or reject any part thereof; and that he must, at his own expense, within a reasonable time, remedy any defective or unsatisfactory materials or work; and that in event of his failure to do so, after notice, the C. Q. M. shall have the full right to have the same done and to deduct the cost thereof from any money due the Contractor. All condemned materials must be at once removed from the reservation.

The specifications, under "Special Conditions" No. 6, provide:

Visiting site.—The Contractor shall visit the site and acquaint himself as to local conditions, availability of water, roads, soil conditions, and the relation of finished grade of the buildings to existing grades and the natural surface of the ground.

7. At the beginning of the work the plaintiff agreed with the defendant that the provisions of article 15 requiring an appeal within thirty days to the head of the department would be waived and that all appeals might be presented at the conclusion of the work. When the work was concluded plaintiff filed written appeals from various decisions of the contracting officer, and its representatives came to Washington to present the appeals in person. They first went to see Brigadier General Guiney, an assistant to the Quartermaster General, who was the contracting officer. He referred them to Captain Bazire, a subordinate, with whom they had a number of extended discussions.

In the course of these discussions plaintiff requested Captain Bazire to let them see the report of the constructing quartermaster on the disputes. He refused to do so, since, he said, the information contained therein might be useful to plaintiff in making out a claim against the defend-

ant. They were also informed that the decisions of the constructing quartermaster on questions of fact were taken as final and conclusive by the War Department and that no investigation of the facts would be made by the Department, although the contractor might dispute the statement of facts of the constructing quartermaster. Finally, they were advised that in cases of doubt as to the correctness of the constructing quartermaster's interpretation of the plans and specifications, this doubt was resolved in favor of the Government.

Thereafter, plaintiff's representatives arranged through one of the Senators from Ohio for a conference with The Assistant Secretary of War. They told him they wanted to present to him their appeals. He told them that—

> * * * he didn't have time to hear appeals, that he couldn't take the time to consider these matters or pass judgment on them because he had too many other weighty things to do—

and he referred them to a Colonel Dunn. Colonel Dunn told them that he didn't have time to pass on the questions, and referred them to Major Pearson. Major Pearson said he did not have time, and referred them to some captain in his office. This captain told them that questions of this sort were left to the Quartermaster General's office for determination. They then went to see the Quartermaster General. He was out and they were referred to one of his assistants, who was Brigadier General Guiney, the contracting officer. General Guiney informed them that he did not have sufficient information to talk to them and referred them to Captain Bazire, his subordinate. They were denied an opportunity to present their appeals to anyone, except Captain Bazire. After their conference with him he wrote out a recommendation to The Secretary of War setting out the action to be taken on plaintiff's various appeals. This was written for the signature of Brigadier General Guiney, who was the contracting officer. General Guiney signed it "For the Quartermaster General" and forwarded it to The Secretary of War. The only documents inclosed with the report were the recommendations of the constructing quartermaster, two letters from the Public

Works Administration, and a letter to be sent to the plaintiff which had been drafted for the signature of The Assistant Secretary of War. The letter as drafted was signed by Harry H. Woodring, The Assistant Secretary of War. This letter, omitting the first paragraph, reads as follows:

> In this connection the Head of the Department or his duly authorized representative only acts in an administrative capacity and relies solely upon the evidence and data presented to it through the Office of The Quartermaster General. The Office of The Quartermaster General has been delegated by The Secretary of War to assemble all necessary data in connection with appeals to the Head of the Department and in so doing it also acts in an administrative capacity and whatever its findings or recommendations might be they are not open to argument or review by the contractor concerned.
>
> Accordingly, while I would be pleased to arrange a personal hearing for you at your convenience with the Head of the Department or his duly authorized representative, nevertheless, such facts as bear upon the case in question, which you evidently desire to present in person, should have been submitted previously to the Quartermaster General in writing.

Only Captain Bazire gave plaintiff's appeals real consideration. The consideration given them by The Assistant Secretary of War was no more than cursory. No real consideration was given the appeals by any superior of the contracting officer.

First cause of action

8. The defendant deducted $6,270.55 from the lump-sum bid because the amount of excavation which it was necessary for the plaintiff to do was less by the above amount than the amount it had estimated would be necessary. The defendant claimed the right to make this deduction by virtue of item XIII in the invitation for bids. This item reads:

> ITEM XIII.—"Unit Prices."
>
> The Contractor shall submit "Unit Prices" in the following schedule for all items listed below.
>
> Those "Unit Prices" will be used in making deductions from or additions to the contract amount, provided any deviation from the drawings and specifications decreases or increases the work indicated or required.

"Unit Prices" shall include the furnishing of all labor and material, complete in place, unless otherwise noted herein.

(a) Earth Excavation, One Dollar ($1.00) per cu. yd.

* * * * *

The plans showed the finished grade and the elevation of the first floor above this finished grade, but they did not show the natural grade nor the elevation of the buildings above the natural grade.

Paragraph S. C. 6, page 7a, of the specifications required the contractor to visit the site to determine "the relation of finished grade of the buildings to existing grades and the natural surface of the ground." The contractor did visit the ground. From this visit and from an examination of the plans and specifications it was able to determine the approximate amount of excavation to be required. It was impossible to determine this accurately since the elevation of the building above the natural grade was not shown. The testimony shows that from the information at hand it was able to determine the amount necessary within approximately a foot.

On December 27, 1934, the Quartermaster General advised plaintiff that it was entitled to be paid the additional sum of $2,641.05 for extra concrete footings and extra rock excavation, but that defendant was entitled to a credit of $6,368.00, since plaintiff had had to excavate a lesser amount than it had estimated.

On January 8, 1935, the sum of $3,755.75 was deducted from the contract price on account of these additions and deductions.

Plaintiff appealed from this decision to the Secretary of War. On December 10, 1935, the Acting Secretary of War made the following finding and decision:

> ITEM II. *Earth excavation credit.*—Paragraph S. C. 6, Page 7a of the Specifications pertaining to visiting the site and ascertaining the relationship between the natural and finished grades became inoperative because at the time bids were received for this work the Constructing Quartermaster had not determined the location of the buildings. Thus it was impossible for you to acquaint yourself with the contour of the natural grade as none existed. Accordingly it appears that you, as

well as the other bidders on this project, construed the contract to mean that the natural grade would coincide with the finished grade indicated on the drawings as this was the only logical procedure to follow. Therefore, your action and understanding of this item shows that the contract terms were modified to the extent that your bid should be based upon the assumption that the natural and finished grades coincide, and any deviations therefrom should be paid for in accordance with the unit prices. Your request for additional compensation arising out of this item is disallowed.

Second cause of action

9. The contract, including of course the drawings and specifications, provided that the concrete footings under the foundation walls were to be of varying widths for the several types of quarters. On May 14, 1934, the plaintiff was notified that all footings should be uniform and should project four inches on each side of the foundation wall. It was also advised that an adjustment would be made in the price to be paid on the contract on the basis of the unit prices stipulated therein.

The plaintiff replied on May 18, 1934, that the work on five of the buildings had progressed so far that no change in concrete footings was possible, but that on the remaining buildings they would be constructed in accordance with the change made. It, however, protested that a deduction in the price to be paid should not be at $20.00 per cubic yard, but at $6.30 per cubic yard, because of the fact that no reduction in the size of the footing forms would result from the change, but only a reduction in the amount of concrete to be poured.

10. On May 21, 1934, the Assistant Constructing Quartermaster advised plaintiff that defendant would insist upon a deduction of $20.00 per cubic yard. On May 23, 1934, plaintiff requested that the matter be referred to the contracting officer. On June 1, 1934, plaintiff was advised that the Quartermaster General had concurred in the contracting officer's decision that $20.00 per cubic yard should be deducted.

On January 11, 1935, the Quartermaster General issued a change order reducing the width of the concrete footings

and providing for a deduction in the price to be paid plaintiff of $20.00 per cubic yard for 135.31 cubic yards of concrete, including footings.

On February 11, 1935, plaintiff accepted as correct a reduction in the amount of concrete footings to the extent of 94.19 cubic yards, but again contended that the unit price of the deduction should be $6.30 per cubic yard, instead of $20.00 per cubic yard, and requested that the matter be held in abeyance until it could present it to the head of the department.

11. On May 23, 1935, the Acting Secretary of War wrote plaintiff sustaining the ruling of the contracting officer as to the unit price to be deducted, but agreeing with plaintiff that the amount of the reduction in cubic yards was 94.19 cubic yards, instead of 135.31 cubic yards. On December 10, 1935, the Acting Secretary of War wrote plaintiff reaffirming this ruling.

Article 3 of the contract reads in part as follows:

> Art. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * *

Item XIII of the invitation for bids, which was accepted by the plaintiff, reads in part as follows:

> Item XIII.—"*Unit Prices.*"
>
> The Contractor shall submit "Unit Prices" in the following schedule for all items listed below.
>
> Those "Unit Prices" will be used in making deductions from or additions to the contract amount, provided any deviation from the drawings and specifications decreases or increases the work indicated or required.
>
> "Unit Prices" shall include the furnishing of all labor and material, complete in place, unless otherwise noted herein.
>
> * * * * *
>
> (c) Type "A" Concrete including Forms, Twenty Dollars ($20.00) per cu. yd.

Third cause of action

12. The specifications provided in part as follows:

> 18. *Type of Concrete.*—Concrete, unless otherwise specified, shall be mixed in the following proportions:
> Variations in the grading of the aggregates on which the proportions are based shall be made for the purpose of obtaining a denser or more workable mix when required by the C. Q. M., but no claim shall be made for extra compensation therefor.
> (1) Type "A" Concrete (Plain):
> One (1) part of Portland Cement,
> Two and one-half (2½) parts of fine aggregate,
> Five (5) parts coarse aggregate #4 to 1½".

Before placing the concrete footings, the plaintiff obtained the approval of the Constructing Quartermaster of the sand and gravel to be used and its method of proportioning it with the cement and water. But plaintiff was instructed to frequently check the amount of moisture and grading as to size.

On May 16, 1934 plaintiff placed type "A" concrete in the footing forms for the first of the buildings. During the pouring it was discovered that the ingredients were segregating, and plaintiff was told that the pour was not satisfactory, but it nevertheless continued to pour it. When forms were removed it was discovered that the concrete was badly honeycombed, and plaintiff was instructed to remove 25.1 cubic yards and replace it with good concrete. This was about 80 percent of the concrete poured.

On May 22, 1934 plaintiff, after consulting a testing laboratory, requested the defendant's permission to change the mix of type "A" concrete to one part Portland cement, 3.1 parts of fine aggregate, and 4.4 parts of coarse aggregate. This permission was granted, and thereafter no further trouble was experienced with the concrete.

The Constructing Quartermaster rejected plaintiff's claim for extra compensation for removing and replacing the condemned concrete, and on appeal the Acting Secretary of War affirmed this ruling. The Acting Secretary of War said:

> ITEM I. *Rejected Concrete Footings.*—The concrete footings the Government ordered you to remove from

the footings of Building "E-1" (your symbol) were defective due to segregation of the coarsest aggregate. This segregation was caused by the method employed by you in handling the concrete, and your failure to take proper precautions in pouring and mixing the same, and not due to an incorrect ratio of the mix which you allege would inherently cause a segregation of the coarsest aggregate. Your request for additional compensation arising out of this item is disallowed.

Plaintiff's claim for extra compensation is made up of the following items:

(a) Cost of laboratory tests	$128.18
(b) Removal of 25.1 cu. yds. of concrete	251.00
(c) Replacing 25.1 cu. yds. of concrete	502.00
Total	881.18

Fourth cause of action

13. The plaintiff in his fourth cause of action sues to recover the sum of $288.84 for furnishing and installing 2,500 special half-timber anchors to secure the half-timber work in place. These, it says, were not required by the plans and specifications and it, therefore, claims this amount as an extra.

The applicable provisions of the specifications are paragraphs 72, 158 and G. C. 20. They read as follows:

> 72. *Mason's and carpenter's building iron.*—Furnish all anchors, joist hangers, straps, hangers, plates, bolts, and all other iron or steel work of whatever description required to properly construct the building.
>
> Windows shall be set so that same with their respective hinges, catches, etc., will work freely, all to the satisfaction of the C. Q. M.
>
> The Contractor shall do all field drilling, tapping, or other miscellaneous work necessary to properly prepare and install the various items.
>
> Anchors for wood wall plates shall be rods, of length shown or required, with anchor plate, nut and washer.
>
> Tie straps for joists where shown on drawings shall be of size and spacing indicated.
>
> * * * * *
>
> 158. * * * Half timber work brackets and Barge boards shall have adzed finish. Half timbers shall be fitted together by halving or with mortise and tennon construction where shown, and pinned with hardwood pins.

All half timber work shall be put together with white leaded joints and secured in place with lug screws or bolts as noted on drawings or nailed where and as necessary.

Construct wood brackets to detail shown.

G. C. 20. *Complete work required.*—It is intended that the drawings and specifications include everything requisite and necessary to properly finish the entire work, notwithstanding every item necessarily involved is not particularly mentioned; all work when finished shall be delivered in a complete and undamaged state.

The contracting officer construed these specifications to require the installation of these anchors and denied plaintiff's claim for extra compensation. This was approved by the Acting Secretary of War on December 10, 1935, in words as follows:

ITEM VI. *Buck anchors, timber anchors, etc.*—This Department considers that you were required to furnish all the anchors included in this item of your claim under the specific and general terms of the contract. Your request for additional compensation arising out of this item is disallowed.

Fifth cause of action

14. In its fifth cause of action plaintiff sues to recover $164.00 for special anchors in order to anchor exterior masonry walls to the attic floor construction and from the attic floor construction to the roof construction on 17 of the buildings of types "E" and "F."

On appeal from the decision of the contracting officer the Acting Secretary of War made the following ruling:

ITEM VII. *Special anchorages for masonry walls at floor.*—It appears that the anchorages furnished by you under this item were necessary in order to correct an error in the design of the buildings, and they were not called for in either the plans or specifications. Therefore, you are entitled to extra compensation for doing this work. This Department considers that your price of $164.00 is reasonable.

This sum, however, has not been paid because there were no funds remaining under the appropriation available for its payment.

These special anchors were not required by the plans and specifications. The reasonable value for furnishing and installing them is $164.00.

Sixth cause of action

15. The contract required the plaintiff to extend the gas and water pipes a distance of five feet outside of each building. Plaintiff was not required to connect these pipes to the service lines running in from the street mains. These service lines had been laid by the defendant, or by an independent contractor. However, plaintiff's subcontractor made a good many connections between the pipes in the house and the service lines from the mains without plaintiff's knowledge. When the plaintiff discovered this, it took the matter up with the Assistant Constructing Quartermaster, advising him that the cost of making these connections was averaging a sum of around $2.00 to $2.25. Plaintiff was instructed to proceed to make the other connections and to submit a proposal for doing all the work. Plaintiff submitted a proposal for $530.00.

Before this proposal was acted upon the defendant discovered that plaintiff had claimed that it had laid extra pipe in excess of the amount which it had actually laid. When confronted with this allegation, plaintiff admitted that it might be in error as to the amount laid, but insisted that its labor costs were accurate.

The contracting officer declined to act upon plaintiff's proposal unless it would uncover all the pipe alleged to have been laid so that the amount claimed by plaintiff could be checked. Plaintiff refused to do this since the cost thereof would have exceeded the amount demanded for the extra work.

Plaintiff made a total of 182 gas and water connections, and it extended the sewer line in connection with the type "B" quarters, and connected it with the main sewer line.

The defendant admits that all of this work was beyond that required of plaintiff by the plans and specifications, and such is the fact. The defendant further admits that the reasonable cost of making the sewer connection was $65.74, and such is the fact. The labor cost incident to

making the gas and water connections and the sewer connection was $376.22, which is the reasonable value thereof. The evidence does not show the amount of extra material used.

On plaintiff's claim for extra compensation in connection with this work the Acting Secretary of War ruled as follows:

> ITEM VIII. *Gas and water service connections—Sewer and water service connections.*—It appears that you made all the necessary connections for the utility service for the buildings constructed by you and that this work was not included in your contract. The evidence indicates that the service extension from the mains were installed to a distance of approximately five (5′) feet from the building foundation walls and there connected by you. In this respect the amount of work you allege was necessary to make these connections does not agree with the Constructing Quartermaster's finding. Therefore, it will be assumed that the two pipe lines in each case met and all that was necessary for you to do was to connect this piping to the five-foot lengths you were required to install. This Department finds that a reasonable cost for this work is 75¢ per connection (25¢ for union and 50¢ for labor). As there were 182 connections of this nature you are entitled to compensation in the amount of $136.50. This Department also finds that you extended the sewer line for the Type "B" Quarters and that your price of $65.74 is considered reasonable. Accordingly you are entitled to compensation in the amount of $202.24 ($65.74 plus $136.50) for your work in connection with this item.

This amount of $202.24 has not been paid, since there were no funds available therefor under the appropriation.

Seventh cause of action

16. In its amended petition filed on February 28, 1940, the plaintiff withdrew its claim under the seventh cause of action, which was for the sum of $145.00 for caulking joints between masonry, chimneys, and wood sidings on 17 double officers' quarters of types "E" and "F," and caulking half-timber work on one officers' quarters of type "B."

Eighth cause of action

17. This claim in the amount of $1,774.63 is for furnishing certain concealed radiation in types "G" and "H" quarters. The specifications read, in part, as follows:

> H-44. *Concealed radiators.*—Furnish and install where indicated on the plans concealed radiators as hereinafter specified. * * *
>
> * * * * *
>
> The contractor shall submit for approval a detail of the installation he desires to use. In the event that the length and depth of the recesses shown on the plans are greater than necessary for the type of heater selected, suitable approved means shall be provided for preventing the air from bypassing around the heater. The concealed heaters shall be standard catalog products of a reputable manufacturer of such equipment and shall be approved by the Q. M. G.
>
> * * * * *
>
> 97. *Radiator recess linings* shall be constructed of material hereinbefore specified, to the sizes shown or required, with all angles straight and true, securely fastened to backing in an approved manner and left smooth and without buckles.
>
> 98. *Radiator grilles* shall be constructed of sheet steel of sizes shown on the drawings and conforming to details. Grilles shall be either punched or pressed into shape.
>
> * * * * *

The architectural drawings indicated no recesses for concealed radiation in types "G" and "H" quarters. But the heating plan did indicate that concealed radiation was to be installed. Plaintff's exhibit "B" 34 showed the heating plan for the buildings in question. At four different places it contains the symbols "C. R. 29 ⌱." The plan shows under the heading "Radiator Schedule" the following:

Radiator schedule

Symbol	Description	*Square feet*
A	Concealed	29
B	----do	40
C	3 Tube 23" High	22
D	----do	26
E	3 Tube 26" High	16⅛
F	----do	37⅛
G	5 Tube 26" High	42
H	----do	49
J	6 Tube 38" High	60
K	7 Tube 14" High	45

Plaintiff's heating and plumbing subcontractor transmitted to the Constructing Quartermaster a letter dated May 23, 1934, from the American Radiator Company, to which was attached a schedule showing concealed radiation for the "G" and "H" quarters. Such schedule was approved by the Quartermaster General on June 5, 1934. On June 28, 1934, plaintiff also sent to the Constructing Quartermaster copies of another list of heating equipment made up by the American Radiator Company, which showed concealed radiation for types "G" and "H" quarters.

On June 28, 1934, plaintiff wrote the Constructing Quartermaster stating that no concealed radiators were shown for types "B," "G," and "H" quarters, but that it would be glad to submit a proposal for furnishing them. Having received no reply to this letter plaintiff again wrote the Constructing Quartermaster on July 10, 1934 stating that it was proceeding with the brick work on these quarters, but was providing no radiator recesses, and plaintiff actually started the work, leaving no recesses for concealed radiation.

While the brick work was being put up plaintiff was notified by defendant's inspector that concealed radiation was called for by the plans and should be installed.

On July 26, 1934, the Assistant Constructing Quartermaster wrote plaintiff insisting on the installation of concealed radiation in types "G" and "H" quarters as shown by drawing No. 625–5475.

On August 6, 1934, the Assistant Constructing Quartermaster called plaintiff's attention to article 2 of the contract and to paragraphs G. C. 19 and G. C. 21 of the specifications, and directed plaintiff to install concealed radiation in types "G" and "H" quarters. Plaintiff protested the ruling, but on August 30, 1934 was notified that the Quartermaster General approved the ruling made.

On December 10, 1935, the Acting Secretary of War made the following decision:

> ITEM III. *Concealed radiation—buildings "G" and "H."*—The concealed radiators for building "G" and "H" were sufficiently indicated on the heating plans to require their installation. Your request for additional compensation arising out of this item is disallowed.

Ninth cause of action

18. In this cause of action the plaintiff sues to recover $90.00 for the drilling and grooving of certain wood beams in order to conceal electrical conduits in said grooves.

The specifications read in part as follows:

> E–7. *Conduit work.*—All conduit, couplings, elbows, etc., which form a part of the conduit system shall be made of zinc-coated mild steel and shall comply with Federal Specification WW–C–581. Conduit shall be run concealed where possible and shall be kept at least 6″ from hot water pipes, steam pipes, and flues. * * *

The plaintiff did not groove the beams over the vestibules in "C" and "D" quarters until defendant had ordered it to do so, for the reason that plaintiff believed the beams were so high that the conduit could not be seen whether or not the beams were grooved.

Plaintiff never filed claim with the Constructing Quartermaster for the drilling and grooving of these wood beams, but its appeal to the Secretary of War did claim this as an extra expense.

On December 10, 1935, the Acting Secretary of War made the following decision:

> ITEM X. *Additional work—Vestibules types "C" and "D" quarters for installation of electric fixtures.*—It appears that the grooving of the wood beams in order to conceal the electric wiring was required under the terms of your contract, and there is no evidence that the special wood blocking was ever made by you. Therefore, as you were not put to any additional expense in connection with this item your request for additional compensation is disallowed.

Tenth cause of action

19. In this cause of action plaintiff seeks to recover $225.00 for furnishing frames for 54 sliding doors to coal rooms which were not called for in the specifications.

On July 9, 1934, plaintiff submitted its shop drawings of the coal room doors. On July 24, 1934, they were returned approved by the Constructing Quartermaster, with the exception that there had been added to them a moulding on

the boiler room side of the coal room slide frames, the cost of which the plaintiff concedes was 67 cents per opening, or $36.18 for the 54 openings. These shop drawings were prepared by plaintiff's contractor and plaintiff submitted them to the Constructing Quartermaster under the impression they were in accord with the plans and specifications. However, plaintiff later discovered that the shop drawings were not in accordance with the plans and specifications, and on July 31, 1934, wrote the Constructing Quartermaster to that effect. The Assistant Constructing Quartermaster replied on August 2, 1934 that the moulding added to plaintiff's drawings entailed no extra cost. On October 29, 1934, the plaintiff proposed to furnish the coal room frames for the extra cost of $225.00. No reply was made to this proposal until November 27, 1934, when plaintiff was notified that the Quartermaster General had ordered that no extra expense should be incurred, but that the plans and specifications for these doors should be followed, and he further stated that a 2 x 6 frame with slide guides nailed on would meet the requirements of the plans and specifications. Plaintiff thereupon informed the defendant that the work had already been done using the frames, the shop drawings of which it had previously submitted, and asked for an extra of $185.00, which was refused by the Constructing Quartermaster on December 6, 1934 on the ground that defendant had not required the plaintiff to install the milled door frames, but that this had been done on plaintiff's own volition.

On December 10, 1935, the Acting Secretary of War made the following ruling:

> ITEM IV. *Additional door frames.*—The plans and specifications did not require you to install millmade door frames for the fifty-four (54) coal rooms, of all Quarters except the 37 Types "G" and "H" Quarters. However, this Department considers that $54.00 is a reasonable and equitable price for this additional work. Accordingly you are entitled to payment in the amount of $54.00 arising out of this item.

Eleventh cause of action

20. In this cause of action the plaintiff seeks to recover $2,103.73 alleged to have been the cost for furnishing and

installing certain structural steel not shown on the plans and specifications.

Plaintiff submitted to the Constructing Quartermaster shop drawings of structural steel which had been prepared by Jones & Laughlin Steel Corporation. They were corrected by the Constructing Quartermaster because he said they were not in accordance with the plans and specifications. Plaintiff returned the corrected drawings to Jones & Laughlin Steel Corporation, which company on May 24, 1934, informed plaintiff that the changes ordered would increase the amount of steel to be fabricated.

Prior to being informed whether or not its shop drawings were approved, Jones & Laughlin Steel Corporation fabricated the steel according to its original shop drawings. In view of this situation, the Constructing Quartermaster, at plaintiff's request, revised his shop drawings so as to use as much of the fabricated steel as possible. This resulted in an increase in the weight of the steel used.

Only cross sections of the steel to be furnished was shown on the original plans and specifications. The length thereof was not shown. The amount of steel required to be furnished was not more than was necessary to properly finish the work as indicated by the plans and specifications.

The Jones & Laughlin Steel Corporation has withdrawn any claim against plaintiff for having been required to furnish steel not called for by the plans and specifications.

The Constructing Quartermaster refused plaintiff's request for an extra. On December 10, 1935, the Acting Secretary of War, on appeal to him, rendered his decision as follows:

> ITEM XII. *Additional structural steel.*—The evidence pertaining to this item indicates that the steel lintels were never definitely designed and it was accordingly necessary for you to submit shop drawings in order to determine the detailed features thereof; and that the lintels indicated on the shop drawings submitted by you were only of a minimum size in order to carry the loads placed upon them. Therefore, as the lintels were never sufficiently detailed in order for you to determine the exact quantity of steel that was indicated on the contract drawings, you were required to furnish the amount of steel that was reasonably necessary in order to com-

plete the work. Also, it appears that your sub-contractor for this work, Jones & Laughlin Steel Corporation, is of the opinion that you only furnished the amount of steel that was required under the terms of the contract. This is evidenced by the fact that it has withdrawn its bill against you for this alleged additional steel.

As an additional factor in connection with this item, any payment that might be made to you would be in the nature of a gratuity and cannot be considered on a quantum meruit basis. Accordingly you are advised that your request for additional compensation arising out of this item is disallowed.

Twelfth cause of action

21. In this cause of action plaintiff seeks to recover $869.78 for an alleged extra coat of paint which it was required to place on the structural steel.

The specifications relating to painting read in part as follows:

83. *Scope of work.*—The work under this heading consists of furnishing all material and equipment and performing all necessary labor to give one (1) protective coating of paint to all structural, miscellaneous iron and steel work.

Nothing herein contained shall be construed to require the painting of metal used for the reinforcement of concrete.

85. *Application.*—Structural steel and miscellaneous iron, except as herein specified, before leaving the shop, shall be cleaned of all mill scale, dirt and rust by the use of steel scrapers, wire brushes, or sand blast. Oil and grease shall be removed with benzine.

* * * * *

Cast iron shall be cleaned by the Contractor and after inspection and approval by the C. Q. M., shall be given one coat of protective paint.

209. *Priming.*—All exterior door and window frames shall be primed at the mill. Rabbets for glazing shall be primed before glass is set. All surfaces and edges of interior and exterior woodwork, except shelves and woodwork otherwise specified, shall be primed with white lead and oil paint at the site before placing and all raw spots touched up with similar paint immediately after being placed. All knots, sap, and pitch streaks

shall be brush coated and shellacked before priming coat is applied. Pulley stiles and parting strips shall be given a heavy coat of linseed oil. Exposed radiators and uncovered and covered heat pipes shall be thoroughly cleaned and then primed with an approved primer.

Wrought iron railings shall be given one coat of approved primer before they receive finished painting.

All surfaces of sheet metal work to be painted shall be thoroughly cleaned and all traces of flux removed before the primer paint is applied. Surfaces of metal work (except reinforcing steel) that will be concealed from view after installation shall be given one coat of red lead and linseed oil paint before being placed in position and all surface that will be exposed to view after installation shall be given a coat of lead and oil paint within three days after being placed in position.

Omit priming on all workwork which is to be stained.

211. *Exterior painting.*—After shop and priming paint coats have been applied and putty-stopped as required, all exterior wood and metal work, except where otherwise specified, shall be painted with three coats of lead, zinc and oil paint. * * *

212. *Interior painting.*—All interior wood and metal work, including exposed pipes and conduits, unenameled portions of plumbing fixtures and exposed pipe covering (not otherwise specified) shall be painted two (2) coats of lead, zinc and oil paint in addition to the priming or shop coat.

* * * * *

22. The structural steel was painted before it left the shop. However, the Assistant Constructing Quartermaster on July 30, 1934, wrote plaintiff stating that while the shop coat called for in article 83 of the specifications had been applied, the field coat called for in paragraph 209 had not been applied, and instructed it to apply it.

23. On August 1, 1934, plaintiff protested against this rule. But on August 9, 1934, it was informed that the Quartermaster General held that the requirement was in accord with the specifications. On appeal to the Secretary of War, the Acting Secretary of War made the following decision:

ITEM V. *Extra Coat of Paint to Structural Steel.*—This Department considers that the painting stipulated

in Paragraphs 83 and 209 of the Specifications does not refer to the same coat of paint and you were accordingly required to apply five (5) coats of paint to the exposed structural steel and four (4) coats of paint to the unexposed steel. Your request for additional compensation arising out of this item is disallowed.

Thirteenth cause of action

24. The plaintiff sues to recover the sum of $2,753.76 for delay caused its electrical subcontractor by the failure of the defendant to deliver certain electrical fixtures at the time agreed upon.

The contract and specifications provided as follows:

> The C. Q. M. will deliver to the contractor the aforementioned fixtures and lamps for the installation. The contractor will be held responsible for all materials delivered to him by the C. Q. M. and will replace any that may become damaged while in his possession until completion and acceptance of the work.

Also, the specifications provided:

> Liability for damages: The contractor will be held responsible for all damage to the work under construction, whether from fire, water, high winds, or other causes, during performance and until final completion and acceptance, even though partial payments may have been made under the contract.

The plaintiff furnished the Constructing Quartermaster with a progress schedule which indicated the electrical fixtures were to be one of the last items to be placed in the buildings. Later, at plaintiff's request, the Constructing Quartermaster on August 13, 1934, advised it that the electrical fixtures for the first 18 buildings would arrive about September 15, 1934, and that the balance was expected prior to November 15, 1934. In his letter he stated that the lighting fixtures should be the last item to be installed. Upon transmission of this letter to him, the subcontractor asked the plaintiff if they should follow the instructions of the Constructing Quartermaster. On November 6, 1934, plaintiff furnished to its electrical contractor a schedule showing the installation of fixtures. According to this schedule plaintiff would have completed the installation of fixtures by January 9, 1935.

The fixtures did not arrive according to the schedule furnished by the Constructing Quartermaster, and on November 12, 1934, and November 15, 1934, and November 21, 1934, plaintiff complained that it would be delayed if the fixtures were not promptly furnished. On December 6, 1934, the Assistant Constructing Quartermaster notified plaintiff that the fixtures were expected to arrive on December 15, 1934.

25. Again, on December 21, 1934, plaintiff's subcontractor wrote plaintiff that he had been delayed on account of the failure to furnish fixtures on time, and that he had on hand only enough fixtures for an additional week's work. This information was transmitted to the defendant. Plaintiff's subcontractor was delayed, in part, because some of the shades on the fixtures could not be installed until the electric lamps had been put in the fixtures, and these electric lamps had not arrived. On January 3, 1935, the Constructing Quartermaster agreed to install the electrical lamps himself, and to relieve plaintiff's subcontractor of the necessity of doing so.

On January 16, 1935, another shipment of fixtures arrived, but 100 or more of them were damaged, and were rejected because not complying with the specifications.

26. On account of the failure of the defendant to deliver fixtures, as promised, it was necessary for the plaintiff to do its work on the various houses in piecemeal fashion. It was unable to complete the entire work on any one house at one time, but it would have to go back later to that house and complete the installation of fixtures after they had been received by the Government. As a result of this plaintiff was put to extra expense. According to its proof, which is not controverted, it was necessary for it to employ laborers a total of 579¾ hours at a cost of $724.69, which sum it would not have been required to spend had the fixtures been delivered as promised by the defendant. It was also put to an expense of $85.00 for use of its truck for 17 weeks.

27. The proof shows that all of the electrical fixtures had arrived by the time all of the buildings had been completed, and plaintiff's claim of $340.00 for 17 weeks stockkeeper's time, and $637.50 for 17 weeks superintendent's time, and for $595.00 for 17 weeks overhead bosses' time, and $68.09 additional insurance costs, is not justified in whole. The plaintiff

was put to additional expense on account of the delay with respect to these items of $820.30. Plaintiff's total damage on account of the delay was $1,629.99.

28. Plaintiff duly took an appeal to the Secretary of War from the action of the Constructing Quartermaster in disallowing its claim for damages on account of this delay, but the Secretary of War refused to pass on it since it was one in the nature of damages.

Fourteenth cause of action

29. In this cause of action plaintiff sues for $6,232.09, being the amount paid its brickmasons over and above what it alleges was the price required to be paid by the contract, plus labor insurance, central office overhead, and bond premium.

Article 18 of the contract provides:

> (a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:
>
> Skilled labor ------------------------------------ $1.20
> Unskilled labor ---------------------------------- 0.50
>
> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

30. Prior to putting in its bid plaintiff investigated the wage rate for brickmasons at Patterson Field, which indicated that the prevailing rate was $1.20 per hour. However, on March 19, 1934 the Commissioner of Conciliation of the Department of Labor of the State of Ohio found that the prevailing rate was $1.30 per hour, and, accordingly, on June 25, 1934 the Constructing Quartermaster directed plaintiff to pay its brickmasons $1.30 per hour.

Plaintiff made no protest against said order, but agreed that it would pay its brickmasons at said rate.

Plaintiff first made claim for the excess wages paid its brickmasons on August 22, 1935, when it filed such a claim with the Secretary of War. On September 4, 1935 the Secretary of War refused to entertain this claim on the ground that under the contract this dispute should have been adjusted by the Board of Labor Review.

Fifteenth cause of action

31. In its fifteenth cause of action plaintiff sues to recover the sum of $235,562.56, which it alleges is the amount by which its labor costs were increased on account of an alleged incorrect ruling by the contracting officer as to the sources from which plaintiff might secure its labor.

Article 19 of the contract, providing for labor supply, reads as follows:

ART. 19 (a). *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivisions and/or county in which the work is to be performed, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or District in which the work is to be performed: *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(b) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however*, That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies but shall be secured in the customary ways through recognized union locals. In the event, however, that qualified workers are not furnished by the union locals with 48 hours (Sundays and holidays excluded) after request is filed by the

employer, such labor may be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and local unions, the labor preferences provided in section (a) of this article shall be observed.

(c) *Compliance with title I, N. I. R. A.*—The contractor agrees to comply with the conditions prescribed in sections 7 (a) (1) and 7 (a) (2) of title I of the National Industrial Recovery Act, and to cause all subcontractors to comply therewith.

32. Patterson Field, where the work was done, is in Greene County, which is a rural county with practically no union labor, except a small union of carpenters. Plaintiff was a union contractor employing only union labor. The place where the work was being done was about the same distance from Dayton, Montgomery County, Ohio, and from Springfield, Clarke County, Ohio, as it was from Xenia, Greene County, Ohio.

33. On July 14, 1934, the defendant's contracting officer ruled that plaintiff was required to secure its labor from not only Greene County, but also from Dayton, Ohio, and Springfield, Ohio, in preference to securing it from any other place within the State of Ohio.

Plaintiff duly protested this ruling, and continued to do so until August 22, 1934, when the ruling was reaffirmed. Still the plaintiff continued to protest and to undertake to get the contracting officer to revoke this ruling. Finally, on November 15, 1934, defendant required one of plaintiff's subcontractors to discharge those plasterers on the job who had been brought in from places other than Dayton and Springfield. Thereupon plaintiff requested that the dispute be referred to the Board of Labor Review. This Board refused to accept jurisdiction of the matter, and plaintiff again took the matter up with the Quartermaster General in Washington in an effort to secure a reversal of the ruling. Plaintiff was advised that the ruling was based on an earlier opinion of one Ben V. Cohen, an attorney in the Public Works Administration. It thereupon took the matter up with this administration, whose Assistant Director

wrote the Quartermaster General on June 10, 1935, as follows:

We should not bring the matter to your attention were it not that the claim is based upon ruling of the War Department resulting from a misconstruction by the Department of Mr. Cohen's letters of November 7 and March 23. The letters were not intended nor were they so worded as to impose upon contractors a requirement that they give labor in a "metropolitan district" a preference prior to taking labor from elsewhere within the state. The letters were written strictly with regard to nonunion local residents claiming preference on union jobs prior to union laborers living within a metropolitan district within the jurisdicton of the union local. Further, although not worded as merely permissive, their import clearly indicated that they were in the nature of a reasonable concession to union contractors so as not to disrupt customary sources of labor supply insofar as such a permission could be considered compatible with the statutory requirement for local labor. It is highly doubtful whether, had such a ruling been made by this Administration as your interpretation of Mr. Cohen's letters produced, the ruling would have been legal in view of the statutory language quoted in Article 19 (a) above.

Further, it seems to us clearly beyond the power of any contracting party to subsequently alter the terms of an existing contract by issuing a mandatory requirement of such materiality.

The General Accounting Office has power under Section 236 of the act establishing that office (June 10, 1921) to settle and adjust claims against the Government. It is an aid to that office, however, to have findings made by the Department concerned and its recommendation in the premises. The Department acts upon a written claim made by the aggrieved contractor.

Accordingly it has been suggested to Mr. Julius Freiburg, the legal representative of The Penker Construction Company, that he file with you a claim supported by a brief. He has informed us that he will do so. It is respectfully recommended that upon receipt of this claim you appoint an officer or board to consider the claim and to make findings of fact with regard to the points thereof and that you transmit to the Comptroller General's Office these findings with such recommendation as you see fit to make.

On June 19, 1935, the Quartermaster General replied that the ruling had been previously approved by the Public Works Administration and declined to reverse it. Whereupon, the Assistant Administrator of the Public Works Administration on July 8, 1935, addressed another letter to the Quartermaster General reading in part as follows:

> * * * Comparing the said provisions of Article 19 with the instruction of the Quartermaster General (approved as aforesaid by Mr. Seward) it is clear that the said instruction imposed obligations on the contractor not justified by the contract provisions. Specifically the added obligation is this: "No resident of the State who is not a resident of Greene County or territory immediately contiguous thereto wherein labor is customarily interchangeable is entitled to employment if qualified labor, whether members of organized labor or not, who are residents of Greene County or territory contiguous thereto are unemployed." The words "or territory immediately contiguous thereto" add an obligation on the contractor not warranted by the contract provisions. The preferences of Article 19 (a) do not require the contractor to exhaust "territory immediately contiguous" to the County in which the work is being performed. When the available and qualified labor in that County is exhausted the contractor is free to resort to bona fide residents of the State, in this case the State of Ohio.
>
> With regard to that portion of the Quartermaster General's instruction which requires that the contractor, wishing "to employ union labor" who is not "furnished with qualified union workers residing in the locality," to obtain labor from lists of qualified workers submitted by local agencies designated by the United States Employment Service: There is evidence in the file that at the time union men residing in counties other than Greene and Montgomery were employed on the work the United States Employment Service did not have on its rolls in Greene County qualified plasterers, bricklayers, etc. If the contractor sustains by proof the absence of such qualified workers on the Greene County rolls this point is immaterial. In any event this issue is collateral to the issue raised in your letter of June 10 which had to do solely with the erroneous requirement of the Quartermaster General (erroneously confirmed by Mr. Seward) that the contractor obtain labor from the area contiguous to Greene County, after having exhausted the available and qualified labor supply in that County.

With regard to the proper course in the premises, the recommendation of the final paragraph of your letter of June 10 states what I believe to be the proper course, to wit: that the Quartermaster General appoint an officer or board to consider the claims of the contractor and to make findings of fact with regard to the points thereof, transmitting to the Comptroller General's office those findings and such recommendations as the Quartermaster General sees fit to make.

As I have said, the error was concurred in and approved by this Administration. That error applied by the Quartermaster General may have caused injury to the contractor. Justice requires that this Administration acknowledge and correct its error.

Accordingly, on the basis of the General Counsel's opinion, I respectfully renew the recommendation contained in my letter of June 10.

I am informed that the Quartermaster General's office is considering the submission to the Comptroller General of the question as to the interpretation involved. It is the Administrator's policy that questions relating to Federal contracts financed by P. W. A. should not be submitted by the department to the Comptroller General but submitted here to be so submitted if the Administrator thinks proper.

The Quartermaster General joined in the suggestion of the Public Works Administration that plaintiff file a claim with the War Department, which plaintiff did. However, it made no investigation of the facts alleged to support plaintiff's claim, but referred the matter to the Comptroller General for a ruling as to whether defendant's labor ruling was correct. The Comptroller General ruled that plaintiff's claim for increased labor costs could not be allowed, because: (1) the appropriation for the work had been exhausted; (2) the damages claimed were remote and speculative; and (3) the plaintiff should have invoked judicial process to require the Board of Labor Review to take jurisdiction of the case and to issue a ruling thereon. Upon receipt of this ruling, and a later affirmance thereof, the War Department refused to give further consideration to the matter and maintained in effect its ruling previously made.

34. Plaintiff had had an informal understanding with the War Department that appeals to the head of the department, under the provisions of article 15 of the contract,

would not have to be made within the thirty-day period provided for therein, but might be presented toward the conclusion of the contract.

Later, on January 30, 1935, the Secretary of War suggested to plaintiff that it file its appeals from the rulings complained of—

> * * * in writing and in sufficient detail to bring out all the facts and circumstances pertaining to the questions in dispute, including such documentary evidence that you desire to present. When the appeal has been reviewed an opportunity will be afforded you, or your representative to appear in person to discuss all the facts. * * *

Accordingly, on February 23, 1935, the contractor prepared an appeal on 24 different items, among which was the dispute with reference to the labor ruling. Later, on March 6, 1935, the Secretary of War acknowledged receipt of plaintiff's letter of February 23, 1935, and requested plaintiff to prepare and deliver to him a detailed report with respect to each item as to which claim was made, stating that should be done before final settlement was made, because, otherwise, the appeal would have to be forwarded to the General Accounting Office for settlement. The detailed report requested was presented on June 28, 1935, prior to final settlement.

35. When the original ruling was made on July 14, 1934, plaintiff had in its employ laborers from places other than Greene County, Springfield, and Dayton. It was not required to discharge them, but on November 15, 1934, it was required to discharge the plasterers brought in from other places.

36. At the beginning of the work the Constructing Quartermaster had arranged for a representative of the Miami Building Trade Union, of Dayton, Ohio, to clear men for the job at Patterson Field. When the ruling of July 14, 1934, with respect to the source of the labor to be secured was made, this union representative was notified thereof, and thereafter approved labor coming only from Dayton, Springfield, or Greene County. Practically all of the labor on the job was cleared through this union representative.

Plaintiff's general offices were in Cincinnati, where it regularly employed a group of skilled union mechanics who had worked with it over a long period of years. Except for those who were brought in prior to the ruling of July 14, 1934, plaintiff was prohibited from employing these men.

37. A considerable number of the laborers on the job, both those employed by plaintiff directly and those employed by its subcontractors, were indifferent and loafed on the job, and a number of them were inefficient. As a result the quality and quantity of their work were poor. This largely increased plaintiff's labor costs.

This work was being done as a part of the program of the Public Works Administration. At the same time improvements at Wright Field, an army post adjoining Patterson Field, were being constructed as a part of the Public Works Administration program, and these operations, together with others, consumed practically all of the labor supply in Dayton and Springfield and Greene County.

This attitude of these men was the result of at least three things: (1) the laborers from Dayton and Springfield and Greene County realized they had more or less of a monopoly on the job and that plaintiff was required to employ them, even though their work was indifferent in quantity or quality, or both; (2) the project was known to be a relief project, one initiated in order to provide employment for laborers; and (3) plaintiff was an outside contractor and, so, the laborers believed they would not have to apply to it for a job again.

38. The increased cost of the labor was due not only to the indifference and inefficiency of some of the laborers, but also to the lack of adequate supervision. It was also due, in part, to the inefficiency of the subcontractor employed to install the plumbing, gas fitting, and heating work. It was also due in part to a strike of some of the employees.

The majority of the laborers on the job, whether they came from Dayton and Springfield or Greene County or other places, were honest, efficient workers, who did an honest day's work and produced satisfactory results. But the indifference and trifling of some of the laborers was a large contributing factor in plaintiff's excess labor costs. Plaintiff was compelled to retain these men on its pay roll on account

of the ruling requiring it to give preference to labor from these localities. The labor supply in these localities was large enough to provide the workmen required, but this work, together with other work that was going on, practically exhausted the labor supply in these communities. As a result of this situation the replacements of the men discharged were of about the same caliber as those who were discharged.

39. The effect of defendant's labor ruling on the attitude of the laborers on the job first became noticeable sometime in August 1934, and continued to grow until it reached its full extent on about November 15, 1934.

Plaintiff's total pay roll up to the time the job was completed on July 1, 1935, was $540,964.36. Of this amount $62,370.58 had been expended by August 3, 1934, $120,478.61 by September 6, 1934, $195,058.61 by October 5, 1934, and $277,652.79 by November 2, 1934.

40. Plaintiff's labor costs, including that of its subcontractors, were increased by the sum of $45,000 on account of this ruling of the contracting officer.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for the sum of $259,033.99, setting out 15 causes of action growing out of the execution of a contract between it and the defendant for the erection of 68 buildings, providing 91 officers' quarters, at Patterson Field, Fairfield, Ohio.

First cause of action

The first cause of action is for an alleged unwarranted deduction of the sum of $6,270.55 on account of a decrease in the amount of excavation which the plaintiff estimated would be necessary.

The plaintiff agreed to erect the buildings for the lump sum of $1,018,300.00, which included the excavation shown. The Government, however, says that it is entitled to deduct the above-mentioned sum from this lump sum price by

reason of the provision of item XIII of plaintiff's bid, which provides in part:

> ITEM XIII. "*Unit Prices.*"—
>
> The Contractor shall submit "Unit Prices" in the following schedule for all items listed below.
>
> Those "Unit Prices" will be used in making deductions from or additions to the contract amount, provided any deviation from the drawings and specifications decreases or increases the work indicated or required.
>
> "Unit Prices" shall include the furnishing of all labor and material, complete in place, unless otherwise noted herein.
>
> (a) Earth Excavation, One Dollar ($1.00) per cu. yd.
>
> * * * * *

The plaintiff replied that this provision is inapplicable because there had been no deviation from the work indicated or required by the drawings and specifications.

The plans showed the finished grade, but did not show the natural grade, or the elevation of the buildings above this grade, but paragraph S. C. 6, page 7a of the specifications required the contractor to visit the site to determine "the relation of finished grades of the buildings to existing grades and the natural surface of the ground." The testimony shows that from a visit to the site and from the plans a contractor was able to determine the amount of excavation "indicated" by the drawings and specifications.

This contractor did visit the site and examined the plans preparatory to putting in its bid. From this it estimated that a certain amount of excavation would be necessary. But because it was not known just what the elevation of the buildings would be, and because, therefore, it could not determine exactly the amount of excavation that would be necessary, it made its estimate sufficiently high to cover contingencies. Its estimate was based on the amount of excavation "indicated." The proof does not show there has been any deviation therefrom. This estimate it included in its figures to arrive at the lump sum for doing all the work.

But the defendant suspected that its estimate for doing this work was more than it had actually cost it, and de-

manded its work sheets to determine this fact. When it turned out it had not cost as much as had been estimated, the defendant asserted the right to deduct the excess.

There is no justification for this. The plaintiff's contract was to do the work called for by the contract for a certain sum, irrespective of cost, and it was defendant's duty to pay the sum stipulated, irrespective of cost. This sum was subject to decrease or increase only in the event there was a "deviation from the drawings and specifications," decreasing or increasing the work indicated. Here there was no deviation from the amount of work indicated. Although the natural grade was not shown on the plans, the required visit to the site supplied this data and from the two the amount of excavation indicated could be and was determined. The exact amount that would be necessary could not be determined because the elevation of the buildings had not been fixed, but while the plans and specifications did not show exactly the amount to be "required," they did "indicate" that amount. The proof shows they indicated the amount necessary within a foot or so, and there is no proof there was any deviation therefrom. There is, therefore, no justification for any deduction from the lump sum bid. That it did not cost plaintiff as much as it had estimated certainly offers no justification for such a deduction.

On this cause of action the plaintiff is entitled to recover, unless the defendant is right in its contention that we have no jurisdiction to render judgment by virtue of the provisions of article 15 of the contract quoted in finding 5, which provides that—

> * * * all other disputes concerning questions arising under this contract shall be decided by the contracting officer * * *.

If this provision be given the broad scope contended for by the defendant, this court would have no jurisdiction of any controversy between parties arising out of a contract in any event, save only in a case where the contracting officer's actions had been arbitrary, capricious, or so grossly erroneous as to imply bad faith. It would leave to the decision of the contracting officer the settlement of all rights of the parties. It would allow him to determine whether

or not either party had breached the contract in any respect and to determine the amount due the plaintiff thereunder. If the defendant had unreasonably delayed the contractor in the performance of his work and put him to additional expense on account thereof, or had otherwise caused him damage, his right to recover therefor would depend upon the decision of the contracting officer. If this decisison was against him, his only recourse would be an appeal to the head of the department.

We cannot believe that this was the intention of the parties. Especially can we not believe this when we take into consideration that the person to determine the rights of the parties was the agent of one of the contracting parties. This court in *Barlow* v. *United States*, 35 C. Cls. 514, at pages 544–545, said of such a contract:

> If the full intent and effect be given to this provision which the defendants now ascribe to it, the contractors might as well have written an agreement on half of a sheet of paper, binding themselves to perform whatever work and furnish whatever material the Chief of the Bureau might require, and accept therefor whatever remuneration the Secretary of the Treasury might be pleased to give them.

It is well settled that provisions preventing resort to the courts to settle the rights of the parties are to be strictly construed against excluding this right. This remedy will not be denied unless the language of the contract makes such a conclusion inescapable. *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298; *Central Trust Co.* v. *Louisville, St. Louis & T. R. Co.* 70 Fed. 282; *Zimmerman* v. *Marymor*, *et al.* 290 Pa. 299; and other cases cited in 54 A. L. R. 1255. This rule should be applied especially in this case because the contract was drawn by the defendant and it provided that its officer should be the final arbiter, and because the contractor had no option but to take the contract as written, or lose the work. *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 611. We think that disputes, as to which the contracting officer's decision is final and conclusive, should be narrowly limited.

The purpose of article 15 was to prevent interruption in the work on account of disputes between the parties as to

the requirements of the contract. This is plainly indicated by the concluding sentence of the article, which reads: "In the meantime the contractor shall diligently proceed with the work as directed." We think the article means that if the parties disagree as to what work is required of the contractor, the final decision thereon shall be left to the contracting officer, subject to appeal to the head of the department, and that the contractor is required to do whatever work the contracting officer decides the contract requires, and that it shall not suspend work because it thinks more is being required of it than should be. The contracting officer's interpretation of the contract requirements of the work to be done is binding on the contractor, but beyond this he has no right to go.

Again we quote from *Barlow* v. *United States*, *supra*, at page 546:

> * * * In the cases of all building contracts there are matters to be determined as the work progresses. Some one must pass upon the fitness of the material, the sufficiency of the workmanship, the amount of work performed, etc. These are matters which can not be left until a building is completed; it is for the interest of both parties that they be settled as the work proceeds. The architect or engineer in charge being the person most familiar with the work, and professionally fitted to pass upon such questions, is ordinarily designated as the referee or arbitrator to determine them. Such agreements for such arbitraments must be upheld. But the agreement now under consideration is a very different thing. It goes far beyond anything that has come before the court since the case of Douglas, for it sets up the Secretary of the Navy, having no personal knowledge of the matter in dispute, as being in effect an appellate court of justice—the court of last resort. It in effect binds one party to abide as to every matter of fact, and as to every question of legal right, by the decision of the other party. Lord Coke said centuries ago that it becomes no man to be both judge and party in the same case.

We are of the opinion that the contract in this case did not give to the contracting officer the right to decide the amount due the contractor, except insofar as his decision of the amount of work required by the contract determines

this question. The instant decision was not an interpretation of what the contract required of this contractor in the way of excavation. By his decision he has said that because the contractor did not have to do as much excavation as it had estimated, it is not entitled to collect the amount included therefor in its bid. This is beyond the authority conferred upon him. The contract gave him the right to make deductions only in case there was a deviation from the amount of work indicated or required by the plans and specifications. Here there was no such deviation. The plans and specifications were changed in no detail and, therefore, in making the deduction he has exceeded the power conferred on him.

We do not think this is in any way contrary to our decision in *Silas Mason* v. *United States*, 90 C. Cls. 266. Our holding there went no further than to say that the contracting officer's decision as to what work was required by the contract was final and conclusive. To that position we adhere. But here the question is not what work was required by the contract, but whether the contractor is entitled to collect the amount stipulated in the contract because it did not have to do as much work as it had estimated.

It results that the plaintiff is entitled to recover on its first cause of action.

However, it appears the contracting officer allowed the plaintiff the sum of $2,641.05 because it had to extend the concrete footings to a depth beyond that it had estimated. The plaintiff was not entitled to this extra compensation. Since it was paid to it because the elevation of the buildings above the natural grade was not definitely shown, and since we have held that this fact did not relieve the defendant from paying the full price bid, although the amount of excavation necessary was less than that estimated, we hold that the extra amount paid for concrete footings must be deducted from the amount the contracting officer deducted from the lump sum bid on account of the decrease in the amount of excavation estimated.

It results that the plaintiff is entitled to recover the sum of $3,629.50 on its first cause of action.

Second cause of action

The contract provided that the concrete footings under the foundation walls should be of varying widths for the several types of quarters. Later, plaintiff was notified that all footings should be of the uniform width of 4 inches on each side of the foundation wall, and it was advised that the price to be paid under the contract would be adjusted accordingly. Later, there was deducted $20.00 a cubic yard for the reduction of 94.19 cubic yards. The plaintiff agrees on the amount of cubic yards reduced, but says that the unit price to be deducted was not $20.00 per cubic yard, but $6.30 per cubic yard.

The change was made under article 3 of the contract and under item XIII of the invitation for bids, quoted supra, which provides for the deduction of "unit prices" where there is a deviation in the work required by the drawings and specifications. This item provides for a deduction of "type A concrete * * * including forms * * * at $20.00 per cubic yard."

The plaintiff in support of its position says that the $20.00 per cubic yard applies only when concrete and forms are increased or decreased, and does not apply where only the concrete and not the forms are reduced or increased, and it says that the change ordered resulted only in a reduction of the amount of concrete, and did not result in any reduction in the amount of forms necessary.

The evidence amply supports plaintiff's contention. The changes ordered did not result in reduction in the forms necessary, but did result in reduction in the amount of concrete poured in these forms. This being true, paragraph (c) of item XIII is not applicable because it provides for a reduction in concrete *including forms*. The reduction to be made, therefore, is the reduction provided for in article 3, which provides for "an equitable adjustment." Plaintiff's proof that this equitable adjustment is $6.30 per cubic yard is not controverted. The reduction to be made, therefore, is $593.40, instead of $1,883.80, which was the amount deducted by the contracting officer. Plain-

tiff is, therefore, entitled to recover the difference of $1,290.40.

We think it is entitled to this deduction, notwithstanding the action of the contracting officer holding that the deduction of $1,883.80 should be made, since the contracting officer's action in making this deduction was not authorized by the contract. The contract confers certain authority on the contracting officer, and when he acts within the scope of that authority his decisions are binding; but when it appears that he has exceeded that authority, or has acted in a way contrary to the mandate of the contract, it is the duty of this court to set aside his decision and render that decision required by the contract. The contracting officer's deduction of $20.00 per cubic yard for reduction in concrete only was not authorized by the contract and, therefore, must be set aside.

Plaintiff is entitled to recover on this item the sum of $1,290.40.

Third cause of action

The specifications required the contractor to use a mix of one part cement, two and one-half parts of fine aggregate, and five parts of coarse aggregate for type "A" concrete. Before mixing the concrete the plaintiff obtained from the Constructing Quartermaster approval of the sand and gravel and its method of proportioning cement, sand and gravel, and water; but after some thirty or more cubic yards had been poured and the forms had been removed, it was discovered that a large part of it was honeycombed. Because of this defect, the Constructing Quartermaster ordered about 80 percent of it, or 25.1 cubic yards, removed and replaced. The plaintiff sues for the cost thereof on the theory that it was impossible to prevent honeycombing with the mix specified. The testimony is in conflict over this question. Two concrete experts introduced by the plaintiff testified that it was not possible to prevent honeycombing with the mix specified, but an expert from the Bureau of Standards testified that it was possible. It is also true that the Constructing Quartermaster, at plaintiff's request, permitted a change in the mix from that specified to one

part of cement, 3.1 parts of fine aggregate, and 4.4 parts of coarse aggregate, and that after this change had been made no further trouble was experienced with the concrete poured. But, on the other hand, it is also true that while the first concrete was being poured the plaintiff was advised that the pour was not satisfactory, but, nevertheless, it continued to pour it.

The Assistant Secretary of War, on appeal from the decision of the contracting officer, decided that the honeycombing—

> * * * was caused by the method employed by you in handling the concrete, and your failure to take proper precautions in pouring and mixing the same, and not due to an incorrect ratio of the mix which you allege would inherently cause a segregation of the coarsest aggregate.

We think the contract conferred authority on the contracting officer to make final and conclusive decisions on whether or not plaintiff's work was up to the standard required by the specifications, subject to appeal to the head of the department. Plainly, the parties intended to confer on the contracting officer the authority to determine such questions as the work progressed, and they did not intend that the further prosecution of the work should await a trial of such an issue before a court. Such questions had to be determined on the ground, immediately, as the work progressed, in order to prevent a stoppage of the work. On such questions the contracting officer was the final arbiter, subject to the right of appeal.

However, plaintiff asserts vigorously that the right of appeal was denied it, that the appeal granted to the head of the department was pro forma only; that no genuine consideration was given to it by the contracting officer's superiors and, therefore, that the decision of the contracting officer is not final and conclusive, but may be reviewed by this court. If no genuine consideration of the appeal was given to it by the contracting officer's superiors, as designated by the head of the department, it is plain that we have the right to review the contracting officer's action. Failure to give it such consideration would be a plain breach of the contract. Plaintiff did not agree to submit its rights

to the uncontrolled action of the contracting officer. From a careful review of the evidence, both for the plaintiff and the defendant, we conclude that adequate consideration was not given to it by the contracting officer's superiors.

It had been agreed between the plaintiff and the defendant that the prosecution of appeals from the decisions of the contracting officer might be deferred until conclusion of the work or thereabouts. About the time the work was finished the plaintiff and its representatives came to the War Department for the purpose of presenting its position on the disputes appealed. They first went to see Brigadier General Guiney, an assistant to the Quartermaster General, who was the contracting officer. He referred them to Captain Bazire, a subordinate, with whom they had a number of extended discussions.

In the course of these discussions plaintiff requested Captain Bazire to let them see the report of the constructing quartermaster on the disputes. He refused to do so, since, he said, the information contained therein might be useful to plaintiff in making out a claim against the defendant. They were also informed that the decisions of the constructing quartermaster on questions of fact were taken as final and conclusive by the War Department and that no investigation of the facts would be made by the Department, although the contractor might dispute the statement of facts of the constructing quartermaster. Finally, they were advised that in cases of doubt as to the correctness of the constructing quartermaster's interpretation of the plans and specifications, this doubt was resolved in favor of the Government. All this convinced plaintiff it could make no progress with Captain Bazire and it inquired if the matter might be presented to the Secretary of War. Upon being told they might do so, they arranged through one of the Senators from Ohio for a conference with The Assistant Secretary of War, Mr. Woodring. Mr. Woodring told them (to quote the testimony of Mr. Goldman, which is amply corroborated) that—

> * * * he didn't have time to hear appeals, that he couldn't take the time to consider these matters or pass judgment on them because he had too many other weighty things to do—

and he referred them to a Colonel Dunn. Colonel Dunn told them that he did not have time to pass on the questions, and referred them to Major Pearson. Major Pearson said he did not have time, and referred them to some captain in his office. This captain told them that questions of this sort were left to the Quartermaster General's office for determination. They then went to see the Quartermaster General. He was out and they were referred to one of his assistants, who was Brigadier General Guiney, the contracting officer. General Guiney informed them that he did not have sufficient information to talk to them and referred them to Captain Bazire, his subordinate. Mr. Goldman said:

> I explained to General Guiney that's where I started, that I was going back to the very place from which the appeal was really coming, because Captain Bazire had told me that he followed the field.

They were, nevertheless, required to interview Captain Bazire.

Only to Captain Bazire did they have any opportunity to present their case, and this was without having the benefit of the position of the constructing quartermaster. See *Morgan* v. *United States*, 304 U. S. 1, 16–21. They had no opportunity to present it to a superior of the contracting officer. Only his superior, of course, could pass on an appeal from his decisions.

Finally Captain Bazire, in conjunction with one of his assistants, Mr. Gray, wrote out a recommendation to The Secretary of War setting out the action to be taken on plaintiff's various appeals. This was written for the signature of Brigadier General Guiney, who was the contracting officer. General Guiney signed it "For the Quartermaster General" and forwarded it to The Secretary of War. The only documents inclosed with the report were the recommendations of the constructing quartermaster, two letters from the Public Works Administration, and a letter to be sent to the plaintiff which had been drafted for the signature of The Assistant Secretary of War. The letter as drafted was signed by Harry H. Woodring, The Assistant

Secretary of War. This letter, omitting the first paragraph, reads as follows:

> In this connection the Head of the Department or his duly authorized representative only acts in an administrative capacity and relies solely upon the evidence and data presented to it through the Office of The Quartermaster General. The Office of The Quartermaster General has been delegated by The Secretary of War to assemble all necessary data in connection with appeals to the Head of the Department and in so doing it also acts in an administrative capacity and whatever its findings or recommendations might be they are not open to argument or review by the contractor concerned.
>
> Accordingly, while I would be pleased to arrange a personal hearing for you at your convenience with the head of the Department or his duly authorized representative, nevertheless, such facts as bear upon the case in question, which you evidently desire to present in person, should have been submitted previously to the Quartermaster General in writing.

The proof does not show to what extent The Assistant Secretary of War considered the recommendations drafted by Captain Bazire and his assistant and signed by General Guiney, or to what extent he considered the matter otherwise. However, we think it can be safely assumed that he gave it but scant consideration, if any, in view of his statement to Mr. Goldman, quoted above, that "he couldn't take the time to consider these matters or pass judgment on them because he had too many other weighty things to do."

The plaintiff by a number of witnesses undertook to prove that the only consideration that was ever given to its appeals was by Captain Bazire. The defendant introduced no one who disputed this fact. The inference from the entire testimony is inescapable that no superior of General Guiney, the contracting officer, ever gave this matter more than cursory consideration, if any.

The defendant contends in this case that the contractor agreed to forego its right to resort to the courts for protection of its rights, and agreed to leave to the officers of the other contracting party the sole right to decide what its

rights were, subject to review by no one. If this be true as to any dispute, then it must follow that the consideration given the dispute in the first instance, and the consideration given it on appeal, must be a genuine consideration, something approaching the consideration that would be given it were it tried in a court of justice. The proof shows that the consideration given the disputes by the superiors of the contracting officer did not even approach that to which the plaintiff was entitled. Cf. *Morgan* v. *United States*, 304 U. S. 1, 16–21.

The plain truth is that the appeal was in reality denied, and it was denied, forsooth, because, said The Assistant Secretary of War, "he couldn't take the time to consider these matters because he had too many other weighty things to do." Yet it was The Assistant Secretary of War who had required the plaintiff to surrender its right to appeal to the courts and who had insisted that he should be the final arbiter of plaintiff's rights. The procedure was a travesty of justice. It cannot be countenanced in an enlightened civilization. In such a case the courts must step in and protect plaintiff's rights. See *Sun Shipbuilding & Dry Dock Co.* v. *United States*, 76 C. Cls. 154, 185; *Lawman* v. *United States*, 41 C. Cls. 470; *Carroll et al.* v. *United States*, 76 C. Cls. 103.

We conclude that the appeal provided for by the contract having been denied the plaintiff, this court may review the decision of the contracting officer.

Two experts introduced by plaintiff testify that it was not possible to prevent honeycombing in the concrete with the mix specified; an expert from the Bureau of Standards testified that it was possible; but, at any rate, the constructing quartermaster, at plaintiff's request, permitted a change in the mix, and thereafter no further trouble was encountered. It seems to us that the evidence preponderates in favor of plaintiff's position, that the cause of the honeycombing was the mix specified.

Plaintiff, therefore, is entitled to recover the cost of removing and replacing the concrete condemned in the amount of $881.18.

Fourth cause of action

In its fourth cause of action the plaintiff sues for $288.84 for furnishing and installing 2,500 special half-timber anchors to secure the half-timber work in place, which it says was not required by the contract.

Paragraph 158 of the specifications reads in part:

> 158. * * * Half timber work brackets and Barge boards shall have adzed finish. Half timbers shall be fitted together by halving or with mortise and tennon construction where shown, and pinned with hardwood pins.
>
> All half timber work shall be put together with white leaded joints and secured in place with lug screws or bolts as noted on drawings or nailed where and as necessary.
>
> Construct wood brackets to detail shown.

Paragraph 72 provided:

> 72. *Mason's and carpenter's building iron.*—Furnish all anchors, joist hangers, straps, hangers, plates, bolts, and all other iron or steel work of whatever description required to properly construct the building.
>
> Windows shall be set so that same with their respective hinges, catches, etc., will work freely, all to the satisfaction of the C. Q. M.
>
> The Contractor shall do all field drilling, tapping, or other miscellaneous work necessary to properly prepare and install the various items.
>
> Anchors for wood wall plates shall be rods, of length shown or required, with anchor plate, nut and washer.
>
> Tie straps for joists where shown on drawings shall be of size and spacing indicated.

Paragraph G. C. 20 provided:

> G. C. 20. *Complete Work Required.*—It is intended that the drawings and specifications include everything requisite and necessary to properly finish the entire work, notwithstanding every item necessarily involved is not particularly mentioned; all work when finished shall be delivered in a complete and undamaged state.

The contracting officer ruled that these anchors were required by the plans and specifications. The letter signed by The Assistant Secretary of War read:

> ITEM VI. *Buck anchors, timber anchors, etc.*—This Department considers that you were required to furnish

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> all the anchors included in this item of your claim under the specific and general terms of the contract. Your request for additional compensation arising out of this item is disallowed.

The question as to whether or not these anchors were required called for an interpretation of the provisions of the contract. We are not satisfied that the contracting officer's decision thereon was erroneous. The plaintiff, therefore, is not entitled to recover on this item.

Fifth cause of action

The defendant concedes that the plaintiff is entitled to recover the sum of $164.00 for the installation of special anchors to anchor the exterior masonry walls to the attic floor construction and from the attic floor construction to the roof construction on 17 of the buildings of types "E" and "F," since these items were not called for by the plans and specifications. We agree that this is so. The plaintiff is entitled to recover $164.00 on this cause of action.

Sixth cause of action

In this cause of action the plaintiff sues for alleged cost of connecting the gas and water pipes in the buildings to the outside gas and water pipes, and also for the cost of making a sewer connection. The defendant admits that this work was not required by the contract, and acknowledges liability for the reasonable value of the work done. The Acting Secretary of War has allowed plaintiff the sum of $202.24 but this sum has not been paid. Plaintiff made claim for $527.99, claiming it had been necessary to use additional material in running the pipes from the place where it was supposed to run them under the contract to the outside pipes. But upon investigation it was discovered that the pipes had not been run for the length claimed by the plaintiff, and the plaintiff admitted—

> * * * it is quite possible that we are in error regarding the exact quantity of extra pipe furnished and installed by us, and furnished by the government in making these service connections, as this information was taken from rough sketches made by the workmen of our subcontractor for plumbing, heating, and gas fittings, who installed the service connections.

But the plaintiff insisted that its claim for labor costs in making these connections was correct because they were obtained from actual records made at the time. The bill submitted by plaintiff, which is filed as exhibit N–5–E, shows total material of $123.57, and total labor costs of $238.50. We think the plaintiff has carried the burden of proof as to the labor cost, but that it has not done so as to the cost of the material furnished.

Plaintiff's bill, therefore, should be reduced by the amount of material claimed, plus the 10 percent overhead, 10 percent profit, and 1½ percent bond incident to this material cost. This would reduce plaintiff's claim from $527.99 to $376.22, which amount it is entitled to recover on this cause of action.

Plaintiff's testimony further shows that after some of the connections had been made it informed the Assistant Constructing Quartermaster that the cost of making the connections was between $2.00 and $2.25. There were 182 connections. At $2.00 a connection the total cost would have been $364.00, which is approximately the amount above figured, excluding the material.

We do not think that the plaintiff is bound by the action of the Secretary of War on this item aside from his failure to grant plaintiff the appeal to which it was entitled. There is nothing in the contract which gives to the contracting officer or the Secretary of War the right to determine the amount due plaintiff for this character of extra work. Plaintiff's claim does not arise under the contract, but outside of it. This was not an extra ordered in the manner set forth in the contract. Plaintiff's right to recover is grounded, not on the contract, but upon the fact that the work was done with the defendant's knowledge and consent and that it accepted and retains the benefit thereof.

Seventh cause of action

Plaintiff waives its claim set out in this cause of action.

Eighth cause of action

In this cause of action the plaintiff sues for the sum of $1,774.63 for the cost of installing concealed radiation in

the buildings of types "G" and "H". The plaintiff contends the plans did not call for concealed radiation.

It is true the architectural plans of the buildings did not show concealed radiation, but the heating plans did, although not very definitely. Under the heading of "Radiator Schedule" it was provided that the symbol "A" would denote concealed radiation of 29 square feet, and that symbol "B" would denote concealed radiation of 40 square feet. Instead of using the symbol "A" on the basement plan, the draftsman showed at certain places what would appear to be recesses and marked them C.R. 29 ⊏⊐. In other words, the draftsman put "C.R. 29 ⊏⊐" instead of using the symbol "A." This clearly indicates, it seems to us, that concealed radiation was to be installed at these places, but if there was any doubt in the contractor's mind about whether or not this was so, it was its duty to take the matter up with the contracting officer and obtain from him a decision as to what was intended. This it did not do, but instead proceeded with the work in the face of article 2 of the contract, which reads as follows:

> In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense.

Moreover, the contracting officer has decided this dispute adversely to the plaintiff and, being a dispute over the proper interpretation of the drawings and specifications, we do not think it should be disturbed unless we are convinced it was erroneous. We are not so convinced. The plaintiff is not entitled to recover on this cause of action.

Ninth cause of action

The specifications required all conduits to be concealed. Whether or not they were sufficiently concealed without the use of grooves was a matter committed to the discretion of the contracting officer. That decision was against the plaintiff, it was within the scope of the contracting officer's authority, and we are not convinced it was erroneous.

Tenth cause of action

Plaintiff sues for an extra of $225.00 for the installation of milled door frames not called for by the plans and specifications. Plaintiff is correct in saying that they were not called for by the plans and specifications. It would appear, however, that plaintiff is responsible for their having been used. The defendant did not require them of the plaintiff. At the beginning the plaintiff furnished shop drawings showing these doors. They were approved by the Constructing Quartermaster, with the addition of a moulding which apparently cost 67 cents an opening for 54 openings. When the plaintiff discovered its mistake it asked for an extra, but the Assistant Constructing Quartermaster replied that the moulding which he had added to the plaintiff's drawings had not increased the expense, and plaintiff's request was refused.

Later plaintiff submitted a formal proposal to furnish these frames for the cost of $225.00. About a month later the Quartermaster General instructed the parties to follow the plans and specifications and not to incur extra expense. But plaintiff, without waiting for this decision, had gone ahead and installed the frames. Under this statement of facts it seems plain to us that plaintiff is not entitled to recover.

Eleventh cause of action

Plaintiff seeks the sum of $2,103.73 for the alleged cost of furnishing certain structural steel which it claims was not called for by the plans and specifications.

The contracting officer has ruled adversely to the plaintiff, and apparently this ruling is correct, since Jones & Laughlin Steel Corporation, which furnished plaintiff with the steel, has withdrawn any claim for having been required to furnish more steel than that called for by the plans and specifications. It would appear that plaintiff has been put to no extra expense in this matter unless the labor cost for installing the steel was greater than it should have anticipated. But the proof shows that the heavier steel installed was permitted in order to save plaintiff from loss from the fabri-

cation of the steel by a subcontractor prior to the time its shop drawings had been approved.

It seems clear to us that plaintiff is not entitled to recover on this claim.

Twelfth cause of action

The plaintiff seeks to recover the sum of $869.78, the cost of applying a coat of paint to the structural steel which it alleges was not called for by the plans and specifications.

The contracting officer has ruled against plaintiff. The contracting officer was made the interpreter of the plans and specifications and we are not convinced his ruling was erroneous.

Thirteenth cause of action

In this cause of action the plaintiff sues for damages for delay occasioned its subcontractor on account of the failure to furnish electrical fixtures on time. The defendant admits the plaintiff's subcontractor was damaged.

After reviewing the testimony, we are convinced this is so. The amount of the delay, however, is difficult to ascertain. The proof of plaintiff's subcontractor is the only proof in the record. This shows additional labor cost of $724.69, and additional truck expense of $85.00, and, in addition, plaintiff claims $1,640.59 on account of additional stockkeeper's time, additional superintendent's time, additional overhead bosses' time, and additional insurance costs.

Inasmuch as the fixtures were furnished before the buildings were completed, we are satisfied it was necessary for the plaintiff's subcontractor to keep the stockkeeper and the superintendent and the overhead bosses on the job, irrespective of the failure to deliver the fixtures on time. At any rate, it would have been necessary, no doubt, for them to have been kept on hand a portion of this time. Accordingly, we allow plaintiff its full claim for additional labor costs and for its truck expense, but we allow only one-half of its claim for stockkeeper's time, superintendent's time, overhead bosses' time, and additional insurance costs.

Plaintiff is entitled to judgment for the sum of $1,629.99 on this cause of action.

Fourteenth cause of action

In this cause of action plaintiff sues the defendant for the difference between the amount paid its brickmasons at $1.20 an hour and the amount which it was ordered to pay of $1.30 an hour. It is clear that plaintiff is not entitled to recover. The contract provided for a minimum wage of $1.20, with the proviso that a larger amount should be paid if a larger amount had been agreed upon by organized labor and its employers.

When it was found by the Commissioner of Conciliation of the Department of Labor of the State of Ohio that $1.30 an hour was the prevailing wage, the Constructing Quartermaster ordered the plaintiff to pay this wage. This the plaintiff did without making any protest against this ruling. In the absence of such a protest and since the plaintiff did not appeal to the Board of Labor Review, it is clear it is not entitled to recover on this cause of action.

Fifteenth cause of action

In its fifteenth cause of action plaintiff sues for the sum of $235,562.56 for extra costs incurred on account of an alleged erroneous labor ruling.

Article 19 (a) of the contract provided in part as follows:

> ART. 19. (a) *Labor preferences.*—Preference shall be given, where they are qualified, * * * in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivisions and/or county in which the work is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.
>
> (b) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local

employment agencies designated by the United States Employment Service: *Provided, however*, That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies but shall be secured in the customary ways through recognized union locals.

Plaintiff was a union contractor, employing exclusively union men. The place where the work was to be performed was in Greene County, some ten or fifteen miles from Xenia, Greene County, and approximately the same distance from Dayton, Ohio, and Springfield, Ohio, both of which latter places were in counties other than Greene; Dayton in Montgomery County, and Springfield in Clarke County. The defendant ruled that the above-quoted provisions of the contract required plaintiff to give preference not only to labor in Greene County, but also to labor in the contiguous counties of which Dayton and Springfield were the principal cities. The plaintiff contends that the contract required it to give preference to labor from Greene County only, and when this labor supply was exhausted that it had the right to secure its labor from any place in the State of Ohio.

There can be no question about the correctness of plaintiff's position. The defendant's ruling requiring plaintiff to give preference to labor from Dayton and Springfield was manifestly erroneous. As a result of it plaintiff was largely restricted to Dayton and Springfield in securing its labor. There were but few union laborers in Greene County, but there were available in Dayton and Springfield sufficient union labor to do the work and, hence, plaintiff was prohibited from going to other places within the State to secure its labor. Plaintiff says that as a result of this ruling labor from Dayton and Springfield and Greene County believed that they had a monopoly on the job, and that, however poor their work might be, the contractor was required to employ them and was prevented from securing labor elsewhere. Accordingly, it alleges that the labor it secured loafed on the job, was inefficient and indifferent, and that this resulted in excess labor costs in the amount sued for.

There is no doubt that many of the laborers on the job were indifferent and that much time was wasted. The

proof is abundant that this was so; indeed, the Constructing Quartermaster stated, "There was more loafing done on this job than I have noticed on any other job in my experience." In addition, there is considerable proof in the record that a good deal of the labor was inefficient, but that plaintiff was nevertheless required to use it because it was the best that could be obtained from the restricted field.

We cannot, however, agree with plaintiff that the indifference of the labor and their trifling were due only to the fact that they thought they had a monopoly on the job and, therefore, were not required to put forth their best effort. Plaintiff's own proof shows that their attitude was induced, in part at least, by their belief that the project was initiated for the benefit of labor, that it was a relief project, something in the nature of a dole, and that, being of this nature, it was not expected of them that they hold their jobs only at the price of honest endeavor, but that their wages would be paid to them whether or not they gave an honest day's work.

In addition, defendant's proof tends to show that the excess cost was due in part to unwise planning of the work and to inefficient supervision. It was also due in part to the inefficiency of the subcontractor doing the plumbing, gas fitting, and heating work, necessitating his dismissal and the taking over of his contract by the prime contractor. There was also a strike of some of the workmen, which, of course, increased the labor cost.

In our opinion there was more than one factor which contributed toward the increased labor cost. A reading of the proof, however, leaves no doubt in the mind that the defendant's erroneous labor ruling was a large contributing factor.

The real problem encountered is to determine to what extent plaintiff was damaged by this erroneous ruling. The plaintiff's proof of the amount of this damage is unsatisfactory. It introduces a good deal of proof as to what the labor cost should have been. This sum it deducts from what it actually did cost, and the balance, it says, is the damage suffered on account of the erroneous ruling. From

what we have said above, it is manifest that this is not adequate proof of its damage, since, for one thing, we are convinced that factors contributed to the increased cost other than defendant's erroneous ruling.

This being the situation, the defendant says its damage is too speculative, too conjectural, for any judgment to be rendered in plaintiff's favor.

It is well settled that where it is speculative or conjectural as to whether or not the damage caused was the result of the wrongful act on the part of the other contracting party, the party alleged to have been injured cannot recover; but, on the other hand, where it is established with sufficient definiteness that the wrongful act has caused or has contributed toward the damage, the party injured will not be deprived of recovery because the amount of the damage cannot be definitely ascertained. *The F. Mansfield & Sons Co.* v. *United States*, 94 C. Cls. pp. 397, 420–421, and cases there cited; *Palmer* v. *Connecticut Railway Co.*, 311 U. S. 544, 560. In *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562, 563, the court said:

> * * * It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.
>
> * * * * *
>
> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot

> be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. * * *

It is extremely difficult to say just what part of plaintiff's damage was caused by the erroneous ruling, what part by the prevalent belief that this was a relief job and that labor was not expected to do an honest day's work, what part was due to bad planning, if any, and what part to lack of alleged proper supervision, etc. We can but arrive at such conclusion as we think the proof and the reasonable inferences to be drawn therefrom reasonably justify.

In arriving at a conclusion certain additional facts must be taken into consideration. The plaintiff started work on April 13, 1934. The defendant first issued the ruling in question three months later, on July 14, 1934. Plaintiff protested the ruling, and continued to do so, but the ruling was reaffirmed on August 22, 1934, against which plaintiff continued to protest, hoping that it would be able to get the defendant to revoke it. However, on November 15, 1934, defendant required one of plaintiff's subcontractors to discharge some of its plasterers who had been brought in from places other than the restricted district. Whereupon, plaintiff, convinced of the hopelessness of persuading the contracting officer that the ruling was erroneous, requested that the matter be referred to the Board of Labor Review. It appears that from July 14, 1934, when the ruling was first made, to November 21, 1934, when the request for reference to the Board of Labor Review was made, the contracting officer's ruling had not become so greatly burdensome on plaintiff as to induce it to exhaust its remedies to have it set aside. Plaintiff's superintendent testified that the effect of the ruling on the morale of the men began to appear sometime in August 1934, which was some four months after the work had commenced, but apparently the situation had not become intolerable until sometime in November. The work was completed on June 1, 1935, except for some minor details, and was fully completed on July 1, 1935.

Plaintiff's total pay roll to the first of July, 1935, was $540,964.36. Of this amount there had been expended up to August 3, 1934, a total of $62,370.58; up to September 6,

1934, there had been expended a total of $120,478.61; up to October 5, 1934, a total of $195,058.61; and up to November 2, 1934, a total of $277,652.79. If we assume the effect on the morale of the men of the labor ruling reached its full extent about midway between the first of August 1934, about when its effect first began to be felt, and November 21, 1934, when plaintiff took its appeal to the Board of Labor Review—say, about October 5, 1934—we find that plaintiff had already spent $195,058.61 for labor, and that thereafter, and prior to July 1, 1935, it expended a total of $345,905.75.

The proof further shows that a considerable majority of the men employed gave an honest day's work and did good work. The indifferent, trifling attitude of the labor on the job was confined to a comparatively small number.

When we take into consideration that at the time the ruling of the contracting officer had reached its maximum effect about 40 percent of the work had been done; and when we consider that there were a number of factors which affected or probably did affect the increased labor cost other than defendant's erroneous ruling; when we consider that many of the workmen on the job were faithful and efficient and were in no way affected by the fact that this was a relief job or that labor from the communities in question had a monopoly on the job, and that only a relatively small percentage loafed on the job and were inefficient; and when we consider, too, the indefiniteness of plaintiff's proof as to its damage from all causes, to wit, by subtracting the amount which it computes the job should have cost it from what it actually did cost it—when we take all of these things into consideration, it is evident that plaintiff's claim of $235,562.56 as the damage incident to this erroneous labor ruling is quite excessive. After the time the labor ruling reached its maximum effect, plaintiff spent but $345,905.75 for its labor, yet it claims an excess labor cost of $235,562.56

Just what was the amount of plaintiff's damage on account of this ruling it is impossible to say, but taking into consideration all the facts and circumstances it seems to us to be a fair and equitable conclusion to reach that this ruling

did not increase its labor costs more than $45,000. We are of the opinion that this sum would fairly compensate plaintiff for the damage suffered on account of this ruling.

Defendant says plaintiff is not entitled to recover anything because it misconceived its remedy and took an appeal to the Board of Labor Review instead of to the head of the department. The plaintiff was amply justified in taking the appeal to the Board of Labor Review, although it may have been mistaken in so doing, and it should not be denied recovery because the defendant drew the contract so as to leave in doubt whether the appeal lay to the Board or to the head of the department. Besides, when the Board refused jurisdiction, the plaintiff did undertake to get the head of the department to rule on the dispute and allow it additional compensation. He affirmed the contracting officer's ruling. This was grossly erroneous. Judgment will be rendered for the sum of $45,000 on plaintiff's fifteenth cause of action.

On the whole case the plaintiff is entitled to recover of the defendant the sum of $52,971.29, for which judgment will be rendered. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, concurring:

I agree with the result reached in this case. I think that the recital in the majority opinion under the heading "Third Cause of Action" shows, as is said in that opinion, that plaintiff was accorded no appeal from the decisions of the contracting officer. The contract provided for such an appeal, and its denial destroyed any finality which might otherwise have attached to the departmental decisions. In this situation, all of plaintiff's claims are properly before the court for decision. It is therefore unnecessary for us to determine the scope and meaning of the provision in Article 15 of the contract that "all other disputes concerning questions arising under this contract shall be decided by the contracting officer * * *, subject to written appeal * * * to the head of the department," and I would not do so.

JAMES I. BARNES v. THE UNITED STATES

[No. 44088. Decided March 2, 1942. Plaintiff's motion for new trial overruled June 1, 1942]

On the Proofs

Government contract; delay in receipt of notice to proceed.—Where plaintiff, a contractor, in response to the invitation of defendant, submitted a bid for the construction work in connection with the extension and remodeling of the United States Post Office and Court House at Quincy, Illinois; and where said bid was accepted on April 3, 1936, and the contract entered into between plaintiff and defendant, providing for completion of contract within 300 calendar days after receipt of notice to proceed; and where such notice to proceed was not received by plaintiff until August 17, 1936; it is *held* that in the circumstances of the instant case there was no unreasonable delay for which the defendant can be held legally responsible and plaintiff is not entitled to recover.

Same; responsibility for delay in obtaining temporary quarters.—Where before work could be commenced under the contract between plaintiff and defendant for construction work in remodeling and extending the United States Post Office and Court House it was necessary to obtain temporary quarters for occupancy by the Post Office and other Federal officers then ocupying said building; and where it was found to be imposible to obtain such temporary quarters under the limitations of the Economy Act, and to make necessary alterations and repairs without delay; it is *held* that the record fails to disclose any fault on the part of the defendant or any of its employes resulting in the delay which occurred in obtaining temporary quarters.

Same.—The record affirmatively shows that the Government's representatives took no more time than was reasonably necessary to do the things that were required by law in obtaining temporary quarters.

Same; reasonable time.—What constitutes a reasonable time is wholly dependent upon the facts and circumstances of the particular case.

The Reporter's statement of the case:

Mr. John F. Hayes for the plaintiff. *Mr. Josephus C. Trimble* was on the briefs.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Frank J. Keating* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, a resident of Logansport, Indiana, is engaged in the construction business. December 14, 1935, defendant prepared and issued specifications for the extension and remodeling of the United States Post Office and Court House at Quincy, Illinois, and, in accordance with these specifications and the standard form of contract for such construction, issued an invitation and advertisement for bids for the work to be done. The date for the opening of bids was extended from time to time and finally fixed as March 10, 1936. Pursuant to the invitation for bids and on the basis of the specifications and the standard form of the proposed contract accompanying it, plaintiff, on March 7, 1936, submitted his bid. On April 3, 1936, plaintiff's bid was accepted. A contract of that date was executed by the defendant and mailed to the plaintiff. It was received by him about April 6, was executed and returned with bond, within two weeks from that date. On April 20 defendant notified plaintiff by wire that the bond had been approved. The contract was signed by defendant represented by C. J. Peoples, Director of Procurement, Treasury Department, as contracting officer.

Under this contract and the specifications forming a part thereof plaintiff agreed to furnish all materials for and perform the work of extending and remodeling the Post Office and Court House at Quincy, Illinois, for the agreed sum of $172,790.00. A copy of the contract and specifications is of record as Plaintiff's Exhibit 1 and is made a part hereof by reference. The contract provided in accordance with plaintiff's bid that the work called for was to be commenced as soon as practicable after receipt of notice to proceed and was to be completed within 300 calendar days after the receipt of such notice. Written notice to proceed with the work called for by the contract and specifications was mailed to plaintiff August 15 and received by him August 17, 1936. The reason for the delay in giving notice to proceed is hereinafter set out.

During the performance of the contract two small additions were made therefor for certain items of extra work and the time for the completion of the contract was extended 30 days to cover these changes. The period for completion of

the contract was thereby fixed at 330 days and the total contract price was increased to $174,669.85. The entire work was completed and accepted within the period specified in the contract. All major items of the work called for were completed about August 22, 1937. The entire work was completed and accepted soon thereafter.

2. Paragraph 20, page 3, of the specifications, provided:

> VACATION OF PREMISES.—The Government will vacate the premises during the life of the contract hereunder. The contractor shall be responsible for the proper care and protection of the premises and be responsible for all damages to persons or property that occur as a result of result of his fault or negligence.

Paragraph 7 of the specifications provided that the time for completion of the contract should be 300 calendar days from the date of receipt of notice to proceed (later extended to 330 days) and Paragraph 8 thereof provided that liquidated damages in the sum of $45.00 would be assessed for each calendar day of delay in completion if not excusable under Article 9 of the contract. Paragraph 12 of the specifications required that bidders should visit the site or premises and fully inform themselves as to the location of the work, the character of the changes and existing materials involved, and as to the conditions under which the work was to be done. It stipulated that failure to take this precaution would not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government. Paragraph 71 provided:

> The contractor shall take the site as he finds it and shall remove all old structures within the lot lines. This work shall include the removal of interior walls, piers, partitions, chimneys, stairs, etc., in old basements or cellars. Exterior walls of basement, cellars or other excavations below grade that act as retaining walls, and all walks, paving or floor slabs on earth, will be removed as specified under "Excavation, Filling, and Grading."

3. A part of the work called for by plaintiff's contract was the demolition and removal of certain exterior walls of the existing building (Specifications, paragraphs 5, 6, 19, 28 and 39). Prior to the submission of a bid by plaintiff his manager

visited the site of the work and examined the building to be remodeled and enlarged. The building was then occupied by the United States Post Office and other Federal offices. At that time plaintiff knew that the work called for by the proposal and the specifications could not be carried on, and that the work of remodeling and extending the building would not be commenced until the premises had been vacated. The record does not show that plaintiff, prior to or at the time of submitting his bid, made any inquiry, or that he was advised by anyone, as to when the Government would probably be able to vacate the building so that the actual construction work of remodeling and enlarging the building could be commenced. At that time the defendant was, and had been since early in December 1935, endeavoring to obtain other adequate quarters for housing the activities of the Post Office and other Federal offices in the building to be remodeled, as hereinafter more fully stated.

4. April 18, 1936, plaintiff wrote the contracting officer as follows:

QUINCY, ILLINOIS, POST OFFICE—EXTENSION AND REMODELING

In connection with the above project, the Government has purchased additional ground to the rear of the present property. A two story brick house sets on this ground and it is a part of my work to wreck and remove this house. This wrecking will have to be done immediately and will require approximately thirty days.

During the time this wrecking is done, I will not be able to do much else on the extension. Inasmuch as the time in which I am allowed to complete this entire job is very short, I hereby request permission from you to proceed immediately with the wrecking of this old house and get it out of the way even before I get your notice to proceed on this project.

It is my information that this old house is not now and will not be used for temporary postoffice purposes. It is possible that I may not receive notice to proceed on this job for two or three weeks. It is my understanding that the title to this entire site is now cleared in the Government's right, and the only factor standing in the way of an order to proceed is the question of securing temporary quarters for the postoffice. Thus, if I have your permission to proceed to wreck and remove this old house it will save me two or three weeks on this job which

has to be completed in a comparatively short time. Even if I get the notice to proceed before the house is entirely wrecked, it would save me just that much time.

An answer to this request by telegram would be appreciated.

April 20, 1936, defendant, in reply to plaintiff's letter, advised him by telegram as follows:

> * * * For your information Government owned building on additional land vacant but notice to proceed under contract will be sent at later date. Any work performed prior issuance notice proceed at risk of contractor.

Plaintiff began the work of wrecking and removing the two-story building mentioned in his letter of April 18, about May 1, 1936, and completed it in about six weeks. It would have been necessary for plaintiff to perform this item of work before beginning the work of remodeling and extending the main post office building even if notice to proceed had been given before the removal of this vacant building was begun.

5. In all cases such as the one covered by plaintiff's contract and specifications, it is the established practice of the United States Public Buildings Administration, in cooperation with the departments or agencies occupying the building to be remodeled or enlarged, to call for and obtain proposals and bids for adequate temporary quarters at an agreed rental before the bids for the remodeling and extension construction work are opened, and that practice was followed in this case. Some time prior to January 28, 1936, the defendant, through the Public Buildings Administration, issued invitations for proposals, in accordance with certain specifications issued at the same time, for temporary quarters for the Post Office and other Federal offices then occupying the Post Office and Court House building intended to be remodeled and enlarged. Bids for such temporary quarters were opened January 28, 1936, and an engineer from the office of the Public Buildings Administration and an inspector of the Post Office Department were promptly designated to examine the property offered by the bidders, and a report with reference thereto, with their recommendation, was made February 14, 1936, by

the engineer and inspector to the Public Buildings Administration, which Administration then referred the bids and proposals, with such report, to the Post Office Department for consideration and recommendation. Three bids were received and opened January 28. It was found that all these bids called for a rental for the temporary quarters proposed to be furnished in excess of the amount which could legally be paid under the provisions of the Economy Act in effect at that time, which limited the amount of rental that could be paid in proportion to the valuation of the property to be rented. Negotiations were had with the bidders in an effort to have them submit bids for a rental within the limitation provided by law. These bidders refused to reduce their bids for rental, and on March 16, 1936, they all withdrew them. At that time the bids for the construction work of remodeling and extending the Post Office building had been opened. It then became necessary for defendant to obtain new proposals and bids for temporary quarters, and on April 2, 1936, two new proposals and one revision of one or the original proposals were received by defendant. The Public Buildings Administration immediately submitted these proposals to the Post Office Department, and a representative of that department was at once designated to inspect, examine, and report upon the two new properties offered by the bidders. This inspector made an examination of the properties and submitted his report and recommendation thereon to the Public Buildings Administration April 22, 1936. Upon receipt of this report and recommendation the Public Buildings Administration found that one of the proposals lacked certain information called for by the invitation for bids and the specifications. When this additional information was obtained from the bidder and analyzed it was found that the rental called for exceeded that which the defendant was authorized to pay under the terms of the Economy Act. The bidder was asked to revise the rental to conform to the Economy Act limitation, which he did on May 5, 1936, and on May 16, 1936, this revised bid, which related to the property considered most desirable by the defendant, was accepted. This accepted bid provided for a period of sixty days after acceptance, or until July 16,

1936, within which the bidder should make the necessary alterations in the property to prepare it for occupancy by the Quincy, Illinois, Post Office. On July 16 the necessary alterations in the building had not been completed and it was found that an additional thirty days' time would be required for such alterations and repairs.

This delay in not having the building ready by July 16 was due to no fault on the part of the defendant. The defendant by letter urged prompt delivery of the temporary quarters, and such quarters were made ready for occupancy on August 17, 1936, and on that day the Post Office at Quincy was moved out of the building to be remodeled and extended under plaintiff's contract and into the temporary quarters so rented and prepared for that purpose. Accordingly the defendant, through the contracting officer under plaintiff's contract, sent to plaintiff on August 15, 1936, a written notice to proceed with the work called for by his contract, and this notice was received and acknowledged by plaintiff August 17 as follows:

> Receipt is hereby acknowledged of your letter dated August 15, 1936, giving me notice to proceed with my contract for the above mentioned project, which was received today.
>
> You are advised that I expect to start actual construction work on this project next Monday, August 24, 1936.

Between the dates of the execution of plaintiff's contract and the acceptance of his performance bond and the date of the notice to proceed plaintiff had knowledge of the reasons and conditions which made it impossible for defendant to vacate the building to be remodeled and enlarged under his contract. No representation or promise, express or implied, was ever made by defendant to plaintiff, before or after his bid was submitted, that the Post Office building to be remodeled and extended would be vacated at any definite date or at any time prior to the date on which adequate quarters could be obtained and made ready for occupancy by the Post Office. Defendant at all times proceeded with all reasonable dispatch in its efforts to obtain adequate temporary quarters in order that the Post Office building might be vacated, that notice to proceed might be given and that plaintiff might proceed with the work called for by his

contract as soon as possible after the acceptance of his bid. During this period plaintiff sent his representative to the offices in Washington, D. C., to urge the speeding up of the arrangements in order that he might receive notice to proceed, and his manager visited the site at Quincy each month during the period of delay to see what could be done to hasten the vacating of the premises.

6. Plaintiff, when making his bid, planned to do the work of removing or demolishing certain of the exterior walls of the existing building and to perform the exterior concrete and masonry work on the additions to be made to the existing building during the summer and to perform the interior work during the winter months. September 2, 1936, plaintiff wrote defendant as follows:

> Re: Quincy, Ill., Post Office & Court House.
>
> In connection with my contract for the above project, I call your attention to the following facts:
>
> Bids for this project were opened March 10, 1936. The letter of award was dated April 3, 1936. A telegram to me regarding this project dated April 20, 1936, advised that my bond was accepted, but that notice to proceed would be sent me at a later date. Notice to proceed was received by me August 17, 1936, and acknowledged.
>
> Your attention is called to the fact that notice to proceed was delayed approximately 4 months after I had completed the contract documents and they were approved by the Department.
>
> When this job was bid last March, it was naturally assumed that the project would be started within a month or so after the opening of the bids, which would give me the summer to complete the major portion of the work while weather was nice. Therefore this was taken into account in the preparation of my figure.
>
> Now with the 4 months' delay in giving me notice to proceed, the bulk of the work will be thrown into the winter, and I will be put to extra expense of heating building, materials, protection of uncompleted work from cold, and the loss of efficiency due to cold weather, which added expense was not contemplated or included in my bid. I therefore believe that consideration should be given to the extra expense that will be caused me on account of this delay and for which I am in no way responsible and did not contemplate.

In addition to the above, the time allowed in the specifications for this work was named at 10 months. As this job was originally figured, the outside work could be done in the summer, and it was contemplated that the work could proceed with hardly no loss of time due to weather conditions. Now with the work falling in the winter months, there will be loss of time on account of weather that was not contemplated in my bid. Therefore, I believe consideration should be given to an extension of time to my contract on this account.

I therefore request that you advise me immediately what consideration you will give to the above matters.

Again on September 8, 1936, he wrote the defendant as follows:

Re: Quincy, Ill., Post Office & Court House.

Under date of September 2, 1936 I wrote you calling your attention to delay on the part of the Government in giving me a notice to proceed on the above mentioned project, which delay will cause me to lose much time in completion of this project due to the exterior work having to be practically all done in the winter months rather than in the summer months as I anticipated.

In addition to what I have previously written, I feel that could I have started this job sooner, I would have been able to do as much in one day in the summer as I will now be able to do in 1½ days, and therefore I believe I am not unreasonable in stating that I feel that I am entitled to 60 days time on account of lack of progress I will be able to make over what I could have made had I been able to proceed with this project as would normally [have] been expected considering the time bids were taken.

I therefore request that I be given an extension of time of 60 days to my contract on account of this delay in giving me a notice to proceed.

September 24, 1936, the contracting officer wrote plaintiff in reply to these letters as follows:

This will acknowledge receipt of your letters of September 2 and September 8, relative to certain alleged damages incurred in the delay in forwarding you notice to proceed with your contract for extension and remodeling of the Quincy, Ill., Post Office and Court House.

It is the opinion of this office that there should be no additional cost for temporary heat involved in this work, inasmuch as it would appear that temporary heat

covering one season would normally be expected to be included in your estimate of the cost of the work.

Regarding the extra time required for doing work during the winter weather, your attention is called to the provisions of your contract which cover the waiver of liquidated damages on account of adverse weather conditions.

No action will be taken on your request at this time. When the actual delays are experienced, you are requested to notify this office within ten days of the start of the delay, and when the total number of days can be determined you should submit through the Construction Engineer your formal claim for an extension in accordance therewith. The claim should be accompanied by all available climatological data, together with Department of Agriculture records covering a term of years, substantiating the fact that the weather encountered was more severe than should be anticipated in the area during the winter season.

7. Plaintiff claims damages in the performance of the work called for by his contract based upon the alleged failure of the defendant to give him notice to proceed within a reasonable time after the contract was executed and the performance bond furnished, and because certain work which he expected to perform during the summer and early fall had to be performed during the winter months at greater expense than he had anticipated. In the petition damages totaling $4,142.65 were claimed. The revised claim now made by plaintiff totals $3,513.99, and is set forth herein for convenience, as follows:

1. Cost of building temporary enclosures at back of old building while rear wall was torn down; labor and material	$132.78
2. Cost of heating concrete materials, masonry material, and thawing ice therefrom	399.30
3. Loss of salvage from old boilers which could not be removed until spring and had to be cut up with an acetylene torch and disposed of as junk after the building was erected	500.00
4. Loss of labor efficiency and extra work and cost due to work in cold weather at 10% of labor costs	1,453.97
5. Idle equipment held for this job which could have been used for other work at a reasonable rental of $100 per month	325.00
6. Overhead 25%	702.94
Total	3,513.99

8. *Claim for $132.78, cost of temporary enclosures (Item 1)*.—Paragraph 20 of the specifications provided: "The contractor shall be responsible for the proper care and protection of the premises and be responsible for all damages to persons or property that occur as a result of his fault or negligence." In making his bid plaintiff included an item of $246.75 for the cost of shoring and enclosing the rear wall of the building to be remodeled. The actual cost of performing this work, as shown by the evidence, amounted to $226.75, or $20.00 less than the amount which plaintiff included in his bid therefor. Temporary enclosures for the torn-out portions of the walls of the existing building were necessary to protect the interior of the building from weather conditions, whether this portion of the work was performed during the summer and fall or during the winter months.

9. *Claim for $399.30, cost of heating concrete and masonry materials (Item 2)*.—Paragraph 32 of the specifications provided that "The contractor shall provide temporary heat as necessary to protect all work and materials against injury from dampness and cold, to the satisfaction of the construction engineer." Plaintiff included in his bid an item of $654.50 for heating the interior of the building and for the protection of the work and materials called for by the contract. As the work was performed plaintiff expended $1,011.55, representing the cost of labor and materials for heating concrete and masonry materials. Plaintiff supplied this heat by means of the boilers which were in the building being remodeled, but which were subsequently replaced by new boilers installed under the contract. It does not appear that it was necessary for plaintiff to incur any expense in otherwise providing temporary heat for the protection of any interior work performed under his contract at the time such work was done. The difference between the cost of heating concrete and masonry materials and the amount included in the bid to cover the cost of providing temporary heat is $357.05.

10. *Claim for $500.00, loss on sale of oil boilers (Item 3)*.—The specifications provided that the old heating system in the existing building should be removed and two new boilers

installed; that all material removed would become the property of the contractor and should be taken from the premises, and that bidders should reflect in their bids the salvage value of materials removed. Prior to the commencement of work under his contract with defendant, plaintiff had a contract with one George Rupp, of Quincy, Illinois, a dealer in scrap iron, to take and purchase from plaintiff all the iron and metal removed from the Post Office building being remodeled, which included the two old boilers in the building, at an agreed price of $11.00 a ton. Plaintiff did not at any time have a contract with Rupp or with anyone else to sell these old boilers intact for $250.00 each or at any other price in excess of $11.00 a ton, which amount, totaling about $220.00, was paid to plaintiff by Rupp when the old boilers were cut into scrap and removed from the building. Plaintiff did not sustain any loss on the sale of these old boilers by reason of their use during the early stages of the work for providing heat for concrete and masonry materials or by reason of his failure earlier to receive notice to proceed with the work under his contract. Had plaintiff removed and sold these boilers intact, the price at which he could have so sold them would not have exceeded the amount of $220.00 which he received for them from Rupp. If defendant had sooner given plaintiff notice to proceed and if plaintiff had desired to remove the old boilers intact, it would have been necessary for plaintiff to incur the expense incident to removing a portion of the basement wall of the existing building in order to get the boilers out, and rebuilding the torn-out portion of such wall.

11. *Claim for $1,453.97*[*.79*], *loss of labor efficiency* (*Item 4*).—This item of the claim represents 10% of an alleged labor pay roll of $14,537.97 and is based upon the assertion that, because the exterior concrete and masonry work had to be performed during the winter months by reason of defendant's failure sooner to give notice to proceed, the labor was 10% less efficient than if such work could have been performed during the summer and early fall of 1936. The correct direct labor pay roll of plaintiff in connection with this work was $12,096.58, the difference being made up of the following items: Superintendent, $996.66; foreman, $458.34; clerk hire, $257.50; crane operator's wages, not paid by

plaintiff, $96.60, and labor paid for providing heat for concrete and masonry materials included in Item 2 (finding 9), $632.29, totaling $2,441.39.

The loss of labor efficiency, by reason of the performance of the concrete and masonry work during the winter months of 1936, did not exceed 5% of the direct labor pay roll, $12,096.58, or $604.82.

12. *Claim for $325.00, rental value of idle equipment (Item 5)*.—There is no satisfactory and convincing proof that plaintiff suffered any loss by reason of his equipment remaining idle during the period between April 30, 1936, when he claims he should have received notice to proceed, and August 17, 1936, when such notice was received. There is no satisfactory and convincing proof that plaintiff had other construction work which was delayed because of his inability sooner to use his equipment, or that he rented similar equipment for other work. Nor is there any evidence to show that there was a market available in which he could have rented his equipment.

The period during which the equipment involved could have been used prior to the date on which notice to proceed was given, if such notice had been given on April 30, did not exceed 2 months, and the rental value of such equipment did not exceed $100.00 per month, or a total of $200.00.

13. *Claim for $702.94, overhead (Item 6)*.—This item of the claim is not sustained by any satisfactory and convincing proof. It represents an arbitrary percentage added to the total of the other five items of the claim for damages. It is not supported by any records of plaintiff. In making his bid plaintiff included therein, to cover overhead expense, an amount representing 2½% of his entire estimated cost of performing all of the work called for by the contract. There is no proof that plaintiff's total overhead expense exceeded the amount included therefor in the contract price.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

On March 7, 1936, the plaintiff, a resident of Logansport, Indiana, submitted his bid for the construction work in con-

nection with the extension and remodeling of United States Post Office and Courthouse at Quincy, Illinois.

On April 3, 1936, plaintiff's bid was accepted, a contract drawn and executed by the defendant and together with a performance bond mailed to the plaintiff. He received it about April 6 and within two weeks executed and returned it, with the bond, to the defendant. On April 20 he was notified that his bond had been accepted and was advised that notice to proceed would be issued at a later date.

The contract was to be completed within 300 calendar days after receipt of such notice, the contract price being $172,790.00. Two small additions were made which called for extra work and as a consequence the time fixed for the period of completion was changed to 330 days and the total contract price increased to $174,669.85.

The notice to proceed was mailed to Plaintiff August 15 and received by him August 17, 1936.

Plaintiff alleges that there was an unreasonable delay in the issuance of such notice and that extra costs were occasioned thereby. For these alleged additional costs and expenses plaintiff instituted this suit.

The question is whether in the facts and circumstances of the case there was an unreasonable delay in the issuance of the notice to proceed.

At the time the contract was entered into the premises were occupied and being used as a post office and courthouse. Before the work of extending and remodeling could begin it was necessary to secure temporary quarters for these activities of the Government.

Some time prior to January 28, 1936, the defendant, through the Public Buildings Administration, issued invitations for proposals in accordance with certain specifications for temporary quarters for the post office and other Federal offices then occupying the post office and courthouse building which was to be remodeled and enlarged.

Bids for such temporary quarters were opened January 28, 1936, and an engineer from the office of the Public Buildings Administration and an inspector from the Post Office Department were promptly designated to examine the property offered by the bidders. A report with their recommendation was made February 14, 1936.

Three bids had been received. Each of these bids was in excess of the amount which could legally be paid under the provisions of the Economy Act, which was in effect at that time, and which limited the amount of rental that could be paid in proportion to the valuation of the property to be rented. (U. S. Code, Title 40, section 40a.)

After negotiations these bidders refused to reduce their bids and on March 16, 1936, withdrew them.

New bids were invited and on April 2, 1936, two new proposals and one revision of one of the original proposals were submitted to the defendant. The Post Office Inspector examined the property and submitted his report and recommendation to the Public Buildings Administration April 22, 1936. It was found that one of the proposals lacked certain information called for by the invitation for bids. When this additional information was obtained and analyzed it was found that the rental called for exceeded the limit which the defendant was authorized to pay under the terms of the Economy Act. The bidder was asked to revise the rental to conform to the Economy Act limitation, which he did on May 5, 1936, and on May 16, 1936, the revised bid, which related to the property considered most desirable by the defendant, was accepted. The accepted bid provided for a period of 60 days after acceptance or until July 16, 1936, for the making of the necessary alterations in the property by the bidder in order to make it suitable for occupancy for the purposes indicated. On July 16 the necessary alterations in the building had not been completed and it was found that an additional 30 days' time would be required to complete such alterations and repairs in order to make the building ready for occupancy.

The defendant by letter urged prompt delivery of the temporary quarters and they were made ready for occupancy on August 17, 1936. On that date the post office and other offices moved out of the building to be remodeled and entered the temporary quarters thus provided.

On August 15, 1936, a written notice to proceed with the work called for by the contract was sent to the plaintiff, received and accepted by him on August 17, 1936, in the following language.

Receipt is hereby acknowledged of your letter dated August 15, 1936, giving me notice to proceed with my

> contract for the above-mentioned project, which was received today.
>
> You are advised that I expect to start actual construction work on this project next Monday, August 24, 1936.

The plaintiff was thoroughly familiar with all these conditions, as well as the efforts of the defendant to arrange for temporary quarters so that notice to proceed might be given. He was charged with knowledge of the general law requiring competitive bidding, as well as the limitations in the Economy Act which had been in effect since prior to the time when the bids were called for.

No representation or promise was made by defendant to plaintiff, either before or after his bid was submitted, that the post office building would be vacated at any definite time. On the contrary, he was fully advised that the post office building could not be vacated nor work begun until adequate temporary quarters could be obtained and made ready for occupancy.

Plaintiff contends that Paragraph 20, page 3, of the specifications, required the defendant to vacate the premises during the life of the contract, and that this placed a binding obligation upon the defendant to give immediate possession. Paragraph 20 reads as follows:

> VACATION OF PREMISES.—The Government will vacate the premises during the life of the contract hereunder. The contractor shall be responsible for the proper care and protection of the premises and be responsible for all damages to persons or property that occur as a result of his fault or negligence.

When read in its entirety it is manifest that the primary purpose of this paragraph is to fix the responsibility for the proper care of the premises and for damages to persons and property during the period of operations. It is notice that since the Government will vacate the premises, the responsibilities above mentioned will naturally fall upon the contractor. But even if the paragraph is construed as an obligation on the part of the Government to vacate the premises, the phrase "during the life of the contract hereunder" meant the period between the date on which the plaintiff was entitled to receive notice to proceed and the

completion of the work called for in the contract and specifications.

The parties could not have meant that the premises would be vacated immediately upon signing the contract. At the time the contract was signed both parties knew that temporary quarters had not been secured. They both knew and the contract provided that work should not begin until notice to proceed had been given. Certainly there was no obligation on the part of the Government to vacate the premises until a reasonable time had been allowed within which to give such notice. Therefore, the whole case comes back to the question of whether the notice to proceed was given within a reasonable time.

It has been uniformly held by the court that the question of what constitutes a reasonable time is wholly dependent upon the facts and circumstances of the particular case.

The delay was unfortunate, but we believe that the officials and employees of the defendant did everything that was reasonably possible in the circumstances and under the limitations of the law to hasten the time when notice to proceed could properly be given.

A search of the record fails to disclose any fault on the part of the defendant or any of its employees. It would have been wholly improper as well as impracticable to issue notice to proceed with the work until proper temporary quarters had been arranged for essential activities of the Government. The only way to procure such quarters was to pursue the method required by the statutes and conform to the limitations therein set out. The employees of the Government began their efforts to secure temporary quarters more than two months before plaintiff's bid was submitted, and pursued the matter diligently. The record not only fails to reveal any fault on their part, but affirmatively shows that they took no more time than was reasonably necessary to do the things that were required by law, and that they gave notice to proceed on the very day that the temporary quarters were ready for occupancy.

It is possible that the defendant as well as the plaintiff was damaged by the delay necessarily incurred in complying with the terms of the law, but in the circumstances there

was no unreasonable delay for which defendant can be held legally responsible.

It follows that plaintiff's petition should be dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE ARUNDEL CORPORATION v. THE UNITED STATES

[No. 44622. Decided March 2, 1942. Plaintiff's motion for new trial overruled June 1, 1942]

On the Proofs

Government contract.—Plaintiff on September 26, 1934, entered into a contract with the Government for the construction of a lock and dam on the Savannah River, below Augusta, Georgia; upon completion of the work and before signing final payment vucher plaintiff submitted to the contracting officer the 12 claims upon which suit is brought in the instant case, and upon adverse ruling by said contracting officer on each said claim an appeal was taken by plaintiff, in proper form, to the Chief of Engineers, who sustained the contracting officer on each claim presented except the first, which he allowed in part and disallowed in part.

Held that plaintiff is entitled to recover on claim No. 3 and is not entitled to recover on any other of said claims.

Same; waiver of time limitation on protest by consideration of claim not timely filed.—Where contract provided that any claim for an adjustment in the contract price for a change made should be asserted within ten days from the date the change was ordered "unless the contracting officer shall for proper cause extend such time"; and where plaintiff did not protest at the time the change was ordered, which is the basis for claim No. 1; and where, nevertheless, the contracting officer considered said claim on its merits without any mention of the fact that it had been filed too late; it is *held* that such consideration was a waiver of the said contract provision. *Thompson* v. *United States*, 91 C. Cls. 166; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, cited; *Johnson* v. *United States*, 94 C. Cls. 175, distinguished.

Same.—Specification providing for driving of piles "without injury to the pile" construed to require plaintiff to cut off portion of the pile which had been broomed in driving.

Same; extra work.—Any work not called for by the contract is extra, although such work is "customary and desirable." Plaintiff was required to construct expansion joints between monoliths of concrete because they were customary or desirable, although not called for by the contract; it was *held* plaintiff was entitled to recover therefor.

Same; appeal to head of the department.—Where the head of the department makes the ruling of which plaintiff complains, the contract provision for an appeal to the head of the department has no application.

Same; changed conditions.—Provision in contract providing for an equitable adjustment in the contract price on account of changed conditions refers to latent condition existing at the time the contract was entered into, and not to one occurring thereafter.

Same; act of God.—Plaintiff is not entitled to recover for damages resulting from an act of God unless defendant contributed to the damage; evidence examined, and *held* that while defendant's refusal of permission to open lock gates in time of flood did contribute to the damage, defendant was nevertheless justified in refusing such permission.

Same; recovery for flood damage.—Contract provided for payment of $2500 for flood damage whenever the stage of the river reached 115 feet. From March 25 to April 16 river twice reached the stage of 115 feet, but plaintiff is entitled to recover $2500 only once because of provision of specifications providing for payment of $2500 "upon full resumption of the work," since plaintiff had not fully resumed work between the two rises.

Same; verbal protest. Plaintiff's verbal protest against verbal instruction insufficient where this verbal instruction was followed by written instruction and the work was done without further protest.

The Reporter's statement of the case:

Mr. William S. Hammers for the plaintiff.

Mr. G. V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation duly organized and existing under the laws of the State of Maryland and has its principal place of business at Baltimore, Maryland.

2. On September 26, 1934, plaintiff entered into a contract with the defendant, represented by C. Garlington, Major, Corps of Engineers, as contracting officer, to furnish all labor and materials and perform all work required for

the construction of a lock and dam on the Savannah River at New Savannah Bluff, Georgia, 12.7 miles below Augusta, Georgia, as described in paragraph 1-02 of the specifications.

3. The contract provided that the work "shall be commenced within ten (10) calendar days after the date of receipt by the contractor of notice to proceed, and shall be completed within six hundred (600) calendar days after said date of notice to proceed." Modifications of the terms of the contract made from time to time under the designation of "Change Orders" enlarged the time for completion of the work to 909 calendar days.

4. Notice to proceed with the work was received by plaintiff on October 11, 1934, and receipt thereof was acknowledged on October 12, 1934.

Plaintiff entered on the performance of the work called for within the time stated for commencement, and completed the same within the time for completion as stipulated by the contract, as modified and extended by change orders.

5. Among the contract provisions pertinent to the issues involved are the following:

> ART. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
>
> ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on

the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

ART. 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

The pertinent provision of the specifications relating to claims and protests is as follows:

Par. 1–24. *Claims and protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter or be considered as having accepted the record or ruling.

6. On May 28, 1937, prior to signing final payment voucher, plaintiff submitted all claims here sued on to the contracting officer, who ruled against plaintiff on each of

the claims. In its letter plaintiff requested that these claims be referred to the Chief of Engineers for review "where necessary" and requested an opportunity for a hearing before the Chief of Engineers "regarding such matters as may be in dispute." On October 11, 1937, plaintiff submitted for the consideration of the Chief of Engineers data and argument on each of said claims, followed by additional data furnished on October 12, 1937. On November 10, 1937, the Chief of Engineers sustained the decision of the contracting officer on each claim presented, except the first, which he allowed in part, and disallowed in part. Plaintiff is suing on the part disallowed. The Chief of Engineers allowed another claim presented in plaintiff's letter of May 28, 1937, but this is not involved in this suit.

CLAIM NO. 1.—ADDITIONAL COST FOR CONCRETE FORMS IN DAM ON ACCOUNT OF ALLEGED CHANGES IN CONTRACT DRAWINGS

7. This claim involves additional costs of concrete forms on the following items:

Control Rooms	1,929.0 sq. ft.
Chain Storage Recesses	707.4 "
Bearing Plate Recesses	290.0 "
Recesses for Pick-up Device	852.5 "

8. Plate 72 of the contract drawings does not show the first and third items referred to in the preceding finding. On the second item referred to above there is the notation "Chain recesses to be furnished later", and on the fourth item above there is the notation "Gate recesses subject to change in dimensions." The chain storage recesses were for chains on the spillway gates, and within the gate recesses there were recesses for pick-up device on the spillway gates. At the time plaintiff submitted its bid the gates had not been designed and, therefore, when plaintiff inquired of Government engineers in regard to them, the information could not be given. In its bid plaintiff did not include costs for additional forms required by the recesses.

9. On December 31, 1934, the contracting officer wrote plaintiff a letter, which reads in part as follows:

> There are being forwarded to you, under separate cover, the following drawings pertaining to our con-

tract W–819–Eng–412, which have been revised to provide for minor modifications as provided under par. 1–17 of the specifications, and certain changes. These drawings should be substituted for the drawings of the same file numbers which you now have in your possession:

*   *   *   *   *

There is inclosed a set of specifications to which minor modifications have been made as shown in red and as provided for under par. 1–17 of our specifications. The specifications which you have on hand should be changed to correspond to the ones inclosed. You will notice that the revision of the drawings has resulted in a modification of the estimated quantities of concrete, structural steel and reinforcing rods under Part J, and also in the addition of the following new materials not listed under Part J and which will be covered by a change order at a later date:

*   *   *   *   *

10. Accompanying this letter were seventeen drawings indicating changes in or modifications of certain contract drawings. Changes are shown on Plate 72 of the contract drawings, whereon are indicated the locations and dimensions of "Chain Storage Recesses" and "Recesses for Pick-up Device" and also the two other items referred to in finding 7.

11. Plaintiff proceeded with the work of the construction of the lock and dam as indicated in the new drawings. After the items referred to in finding 7 were completed a change order was issued covering the first and third items. No change order was issued for the second and fourth items, for the reason that these items had the notations on Plate 72 of the contract drawings as indicated in finding 8. Plaintiff submitted to the Chief of Engineers its claim for the additional costs of the items enumerated in finding 7. Plaintiff based its computation for additional costs on paragraph 5–22 of the specifications, which made the total of its claim amount to $2,569.95.

Paragraph 1–12 of the specifications provides that for any extra work ordered in writing by the contracting officer for which a change order stating the price thereof is not issued, the contractor shall submit to the contracting officer for approval at the close of each day reports show-

ing the cost of such extra work. No such reports were submitted.

12. The Chief of Engineers in his decision of November 10, 1937 held that, as the first and third items were not alluded to on the original Plate 72 of the contract drawings and were not provided for by the original specifications, plaintiff was entitled to payment therefor. Pursuant to this holding, Change Order No. 26 was issued on November 19, 1937. The computation of the Chief of Engineers for additional costs of the first and third items was based on the reasonable cost of the additional forms required, which amounted to $1,344.91, and plaintiff has been paid this sum. On the same basis of computation, the reasonable cost of the additional forms for the second and fourth items amounts to $945.25.

No written protest was made by the contractor to the contracting officer against the order of December 31, 1934 to install the recesses, and no claim for additional compensation therefor was made until May 28, 1937.

CLAIM NO. 2.—TIMBER PILE CUT-OFFS

13. Under the contract for the construction of the lock and dam the lock was to be constructed first. The soil under the river was such that it required the use of wooden piles to strengthen the foundation for the lock and dam structure. There were used 3,811 piles in the lock structure.

14. Plate 15 of the contract drawings shows timber piling for lock walls to be 30 feet in length after being cut off to grade, except when conditions required a different length. Conditions as determined by the contracting officer did require different lengths. The contract provided that the piling driven below the cut-off elevation was to be paid for at 27 cents per linear foot, and the piling above the cut-off elevation at 13.5 cents per linear foot. There were 89,887 linear feet of piling driven below the cut-off elevation, about which there is no dispute and for which plaintiff was paid at the rate of 27 cents per linear foot. According to defendant's measurements there were 9,963.8 linear feet above the cut-off elevation for which plaintiff was paid at the rate

of 13.5 cents per linear foot. Plaintiff claims payment for 9,722.22 additional linear feet above the cut-off elevation at 13.5 cents per linear foot, making $1,312.50.

15. In driving the piling with a pile driver there was an allowance made of one foot for brooming which had to be cut off, so that if a 30-foot pile was to be driven below the cut-off elevation, plaintiff would furnish a pile 31 feet long to allow for the foot of brooming. When the driving of piles began it was discovered that piles would reach the point of refusal before they had been driven the length shown on the contract drawings, and the resident engineer ordered shorter piling.

16. Pertinent provisions of the specifications relative to piles are as follows:

> 4–02. *Determination of lengths of timber piles.*—(a) The quantities of timber bearing piles in the schedule, for the purpose of canvassing bids, are based on a pile length of 30 feet for the lock foundation and 35 feet for the dam and abutment foundations. The actual length to be driven and paid for will be determined from the test piles, furnished, driven and loaded by the contractor at such locations and at such times as directed by the contracting officer. From the results of such test loadings the contracting officer will specify the lengths and quantities to be ordered for the various locations in the work.
>
> * * * * *
>
> 4–03. *Timber piles.*—(a) Length and quality: * * * Timber bearing piles shall be of such length as is determined and directed by the contracting officer in accordance with paragraph 4–02, except where driving conditions clearly indicate that piles of lengths directed cannot be satisfactorily driven shorter lengths may be furnished by mutual agreement between the contractor and the contracting officer. Timber piles for guide walls shall be of the length indicated on the drawings.
>
> (b) *Driving.*—The piles shall be driven to grade if possible without injury to the pile. * * * After driving, all piles shall be cut off square at the elevation shown on the drawings. The cut-offs shall become the property of the contractor and shall be removed from the site of the work.
>
> (c) *Measurement and payment.*—Timber piles will be paid for per linear foot in place. The full price bid

will be paid for the length driven below the cut-off elevation shown on the drawings. If it is found impracticable to drive any bearing pile to the depth specified or the depth mutually agreed upon (see (b) above), the pile will be cut off at the proper elevation and the cut-off portion will be paid for at the rate of 50% of the price bid. No pile will be paid for twice, and the length of cut-off portion of each pile to be paid for shall not exceed the difference between the length specified or mutually agreed upon and the length driven below the cut-off elevation, except that in case spliced piles are used by direction of the contracting officer, the actual length cut off will be paid for.

17. A test pile was a typical pile similar to the ones that were required to be driven permanently. A test pile was driven to determine from the driving conditions and from the load that was put on how long a pile would have to be furnished and driven. The number of test piles to be driven was determined by the contracting officer.

18. Timber piles had to be ordered well in advance in order to keep up the progress schedule. The specifications required that the plaintiff submit a chart indicating the volume of work to be done and the rate of progress which the plaintiff agreed to maintain. The average number of piles driven per day was 100. It took two or three weeks to get the piles delivered after being ordered, and they were delivered by truck on an average of 35 to 40 a day in good weather. In order to avoid delays, it was necessary to have on hand when the driving of piles started at least enough piles for two weeks' work.

19. Before the cofferdam for the lock had been completed and the water taken out of it, plaintiff requested permission from the contracting officer to drive test piles so that it could determine the lengths of the piles to be ordered, so that these piles could be on hand when needed. The contracting officer refused permission to drive these test piles until the cofferdam had been unwatered and the excavation in the cofferdam carried to subgrade, because he was of opinion that only then could the necessary length of the piles be determined.

20. The pumping of the cofferdam was started on March 21, 1935, and, after the completion of the unwatering and

excavation therein, one test pile was driven on April 1 and another on April 2. The loading tests were completed on April 18 and 23, respectively.

21. After results from the driving of the two test piles had been obtained and analyzed, the contracting officer by letter of April 25, 1935 gave instructions to plaintiff on the length of piles as follows:

> All timber-bearing piles for the lock walls upstream from station 1+21B, and for the upper Poiree and upper miter sills of the lock shall have a length of 30 feet below the cut-off elevation shown on the drawings. The timber-bearing piles of the struts upstream from station 1+21B shall have a length of 20 feet below the cut-off elevation shown on the drawings.
>
> The lengths above specified are subject to change in accordance with par. 4–03 (a) of the specifications. In ordering the piling required for this portion of the work you should provide piling of sufficient length so that they will not be split, broomed or otherwise injured after being cut off square at the elevation shown on the drawings.

Within the area referred to in this letter the contract drawings called for 15 strut piles and 1,131 longer piles. As heretofore stated, the total number required beneath the lock structure was 3,811 piles.

22. Based on experience in driving timber piling the plaintiff assumed that the reference in the letter of April 25, 1935 to a sufficient length over that required below the cut-off elevation to provide against injury in driving meant to follow the common practice of allowing a minimum of one foot for brooming.

23. On account of the rate of progress required in the performance of the work and the uncertainty of delivery of piles, plaintiff ordered and had on hand on April 25, 1935, 1,036 piles 31 feet or more in length, with more on the way to delivery.

24. The driving of piles for the lock structure was commenced on April 30, 1935. After driving for a few days it was found impossible to drive the piles to the depth of 30 feet below the cut-off elevation, as specified in the letter of April 25, 1935. On May 2, 1935, there was a conference

between the contracting officer and plaintiff's project manager and the situation was discussed. At this conference it was orally agreed that, instead of adhering to the length specified in the letter of April 25, 1935, defendant's resident engineer should be authorized to prescribe the depth to which the piles were to be driven, with the understanding that the prescribed pay-length would be the length designated by the resident engineer. It was further agreed by the parties that this arrangement would remain in force until further written instructions were issued.

At the time of this agreement plaintiff's project manager informed the contracting officer that he had an agreement with the pile supplier under which plaintiff paid for piling on the basis of the lengths allowed by the defendant. Two or three weeks later the project manager advised the contracting officer that plaintiff would have to pay the pile supplier according to the lengths of the piles that passed inspection on delivery.

No change in the procedure then in force for determining the length of the piles to be paid for was requested by the contractor, and while the work was in progress no request was made by it for payment for additional piling.

25. Following the conference referred to in the preceding finding the contracting officer on May 4, 1935 wrote a letter to the plaintiff's project manager as follows:

> It was evident, on the occasion of my inspection of the work on May 2, 1935, under the driving conditions obtaining for the first two rows of piles that had been driven for the lock foundations at that time, that piles of the length specified in my instructions of April 25, 1935, could not be satisfactorily driven. Therefore, in accordance with the oral agreement reached with you on that date, it will be satisfactory for you to furnish piles of sufficient length to give 27 feet below the cut-off elevation, while such driving conditions obtain. It is understood that as soon as easier driving conditions are encountered longer piles, as specified in letter of April 25, 1935, or as directed by Mr. W. A. Wells, resident engineer, will be furnished.

26. At the time the letter above mentioned was written most of the piles that plaintiff had on hand were for a depth

of 30 feet below the cut-off elevation. To obtain piles for a depth of 27 feet below the cut-off elevation would have taken approximately two weeks. Shorter piles were later obtained by plaintiff. When piles were ordered by the resident engineer of lengths shorter than those the plaintiff had on hand, they were cut back by plaintiff before being placed in the leads.

From May 2, 1935 until June 8, 1935 the lengths of piles placed in the leads were orally prescribed by the resident engineer as agreed to between the contracting officer and the project manager.

27. On June 8, 1935 the contracting officer wrote to the project manager a letter of instructions as to lengths of piles as follows:

> Upon receipt of this letter you will provide timber bearing piles of such lengths that they can be cut off square below any portion which may have been injured in driving, and have the following length below the cut-off elevation shown on the contract drawings:
>
> Land wall lock .... 24 ft.
> River wall lock .... 26 ft.
> Lower Poiree dam and miter sill .... 24 ft.
> Struts .... 20 ft.
>
> The lengths above specified are subject to change in accordance with par. 4–03 (a) of the specifications. You should have on hand some piling of sufficient length so that if unexpected conditions make it necessary to obtain a penetration of 30 feet below the cut-off elevation for some of these piles in order to develop proper supporting power, this can be done without delay which might otherwise arise.

At the time of the receipt of this letter 700 of the 3,811 piles for the foundation of the lock structure remained to be driven.

28. Partial payments were made every 15 days. Payment vouchers submitted to plaintiff were accompanied by estimates showing the number of piles driven and the total number of feet paid for each pay period. The defendant kept a record of the length of each pile placed in the leads and paid the plaintiff on the basis of 27 cents per linear foot below the cut-off elevation, and 13.5 cents per linear foot above the cut-off elevation, less the allowance of one foot

for brooming. The defendant's records of individual piles on which payments were based were made available to plaintiff and were checked by plaintiff's employees each pay period.

29. By letter dated June 3, 1936 addressed to the contracting officer, plaintiff requested an adjustment of the payments made for cut-offs above the cut-off elevation. By letter of June 26, 1936 the contracting officer denied plaintiff's request.

This claim was submitted to the head of the Department by letter of May 28, 1937. The head of the Department in a letter dated November 10, 1937 sustained the decision of the contracting officer.

30. Plaintiff has been paid for 89,887 linear feet of piling driven below the cut-off elevation and for 9,963.8 linear feet as cut-offs, as shown in finding 14. The 9,963.8 linear feet as cut-offs is the difference between the lengths of the piles placed in the leads and the lengths of the piles below the cut-off elevation less the allowance for brooming. Plaintiff claims additional payment on 9,722.22 linear feet as cut-offs, consisting of 5,911.22 linear feet cut off in the storage yard before the piles were placed in the leads and one foot deducted for brooming on each of the 3,811 piles driven for the lock structure.

31. The contracting officer ruled, in prescribing pile lengths to be furnished and paid for, and so informed the contractor, that the portion of the pile providing for brooming should be furnished at the expense of the contractor. No written protest against this ruling was made by the contractor while the pile-driving work was in progress, nor was written protest made to the other orders of the contracting officer relating to the method of determining pay lengths of piles.

CLAIM NO. 3.—ADDITIONAL COST OF EXPANSION AND CONTRACTION JOINTS IN LOCK

32. Paragraph 5–14 (d) (4) of the specifications as amended by Change Order No. 1 provided that, unless otherwise specifically authorized and directed, concrete in mass structures should be placed in monoliths not exceed-

ing 40 feet in length or width, the lay-out of all monoliths to be as directed or approved by the contracting officer before the concreting should be commenced. Plaintiff prepared and submitted to the contracting officer for his approval a monolith lay-out plan for the land wall of the lock and another for the river wall of the lock, which plans were approved on June 3, 1935.

33. At the time of the submission of the monolith lay-out plan, the question was raised as to whether the joints between the monoliths should be ordinary joints or expansion and contraction joints. The contracting officer decided that expansion and contraction joints should be constructed between all monoliths in the lock structure where such joints were not shown or provided for by the contract drawings, and that the contract should be modified to provide that the plaintiff be paid the sum of $1,765 for furnishing the same. Accordingly, on June 22, 1935, the contracting officer issued Change Order No. 7. The plaintiff noted thereon its acceptance of the terms of this change order and returned it to the contracting officer. This change order provided that since the amount involved was in excess of $500.00, approval of the Chief of Engineers would be required before the same became effective, as provided for in article 3 of the contract. Thereafter, on July 30, 1935, the contracting officer by letter advised plaintiff that the change order had been returned to his office by the Department without approval, and directed the plaintiff to provide expansion and contraction joints at all vertical joints between the monoliths of the lock walls, closing the letter with this sentence: "These joints shall be provided without extra cost, in accordance with paragraphs 5-21 and 5-22 of our specifications."

34. Paragraphs 5-21 and 5-22 of the specifications, insofar as material here, read as follows:

> 5-21. *Expansion and contraction joints* shall be constructed at such points and of such dimensions as may be indicated or required. The method and materials used shall be subject to the approval of the contracting officer. * * *
>
> 5-22. *Measurement and payment.*—Measurement of concrete will be made on the basis of the actual volume

of concrete within the lines of the structures as indicated on the plans or otherwise required. * * * Unless otherwise specified, payment for concrete will be made at the respective contract prices per cubic yard for the various classes required, which prices will include the use of all equipment, tools, material, falsework, forms, bracing, bolts, rods, metal ties, dowels, *expansion joint filler*, [italics ours] mortar, surface finish, labor, special provisions for hot and cold weather placing and curing, and all other items required to complete the concrete work, *except the reinforcement and embedded items* which are specified to be paid for separately.

35. On August 9, 1935, by letter, plaintiff acknowledged receipt of the contracting officer's letter of July 30, 1935 and advised him that it desired to protest the decision, through him, for the reason that at the time of the submission of the bid it was the understanding that construction joints would be used and that it had no intimation that expansion and contraction joints would be required at each construction joint.

36. On August 14, 1935, the contracting officer replied to plaintiff's letter of August 9, 1935, directing plaintiff's attention to paragraphs 5-21 and 5-22 of the specifications, and closed the letter with: "If after giving consideration to the specifications applicable, you wish to make an appeal under Article 15 of the contract, you are at liberty to do so."

Plaintiff made no reply to this letter, but proceeded with the work without further protest until the conclusion of the work, when plaintiff wrote the contracting officer its letter of May 28, 1937 claiming $1,726.18 for the cost, including profit, of installing these expansion and contraction joints.

37. The Acting Chief of Engineers by letter of November 10, 1937 denied plaintiff's claim for the following reason:

> On July 24, 1935, this office ruled in connection with this same subject that it is customary and desirable that expansion joints be placed at all vertical joints between monoliths of lock walls and that the cost thereof must be considered as included in the unit contract price for concrete in accordance with the above quoted provisions of paragraph 5-23 of the specifications. You

were advised of this ruling by letter from the District Engineer dated July 30, 1935. I find that there is no valid reason for modification thereof and this item of your claim is, therefore, denied.

CLAIM NO. 4—REPAIRS TO LOCK CONCRETE

38. After the concrete for monolith L–6–B of the lock wall had been poured and the forms removed, the face of a portion of the concrete toward the lock chamber was found to be honeycombed, that is, full of small pockets.

The plaintiff was required to repair this, which it did by the use of a cement gun, at a cost, including profit, of $229.49. The plaintiff made the necessary repairs without protest.

39. The specifications relating to concrete contain the following provisions:

> 5–01. *Composition.*—Concrete shall be composed of cement, fine aggregate, coarse aggregate and water so proportioned and mixed as to produce a plastic, workable mixture in accordance with all requirements under this section and suitable to the specific conditions of placement.
>
> * * * * *
>
> 5–13. *Proportioning.* * * *
>
> (b) *Control.*—The exact proportions of all materials entering into the concrete shall be as directed by the contracting officer. * * *
>
> 5–14. (d) (6).—Concrete in general and mass concrete in particular shall be placed with the aid of mechanical vibrating equipment as approved by the contracting officer * * *. The vibration shall be of sufficient duration to accomplish thorough compaction as approved by the contracting officer. * * *

40. While this and other concrete was being poured, the plaintiff complained that the mix as specified by the defendant did not contain sufficient water. The amount of water to be added was 20.93 gallons, whereas the amount actually added was 20 gallons. Defendant's inspectors and engineers insisted that the plaintiff was not properly vibrating the mix.

The concrete which was honeycombed was only a small portion of the concrete in this monolith, and the concrete

in other monoliths was not honeycombed, although the same amount of water was used.

41. Although plaintiff made no protest at the time for repairing this concrete, it did present claim for the cost thereof in its letter of May 28, 1937. This claim was denied by the head of the department, first, because the honeycombing was due to lack of adequate vibration; and, second, because the extra expense was incurred in order to correct unacceptable work.

CLAIM NO. 5.—FLOOD DAMAGE TO FIRST COFFERDAM FOR THE DAM

42. This claim is to recover damages to the first cofferdam for the dam caused by a flood from January 3, 1936 to January 13, 1936.

43. The lock and dam were built in three sections, each requiring the construction of a cofferdam. The specifications required the lock to be constructed first. This was on the Georgia side of the river. Next to be constructed was the section of the dam on the South Carolina side, and finally that part of the dam joining the lock and the portion on the South Carolina side. Each part of the work required the construction of a cofferdam. As each part of the lock and dam was completed the specifications required the cofferdam therefor to be removed.

44. At the time of the above-mentioned flood the lock structure had been completed and the cofferdam therefor had been removed, except for the dirt which had been placed in the cells for this cofferdam, and on December 12, 1935 plaintiff began the construction of the cofferdam for the first section of the dam.

On January 2, 1936 cells 1 to 6, inclusive, of this cofferdam had been completed and filled with earth, and cell 7 had been completed and had been about three-fourths filled with earth; none of these cells, however, had been bermed with stone.

Paragraph 2-01 of the specifications provided:

> * * * The outside of each cofferdam shall be bermed with stone wherever scour from flowing water or eddy water is likely to occur. * * *

All of these cells could have and should have been bermed prior to January 3, 1936, except that it was not then possible to berm that portion of cell 7 which was adjacent to cell 8 to be constructed.

45. On the day before the flood the machinery for operating the lock gates had not been installed, but they could then be opened and closed by hand. The inside width of the lock was 56 feet, the distance between the river wall of the lock and cell No. 7 of the cofferdam for the first section of the dam was 160 feet, as required by the specifications. On this date the earth used to fill the cells of the cofferdam for the lock had not been removed.

The elevation of the riverbed was 85 feet. On January 2, 1936 the elevation of the river was 105 feet. It rose to an elevation of 119.9 feet by midnight of January 3, 1936, reached a crest of 121.55 feet by January 5, 1936, and receded to an elevation of 114 feet by noon of January 13, 1936.

The elevation of the upstream gate sill of the lock was 101 feet, and the elevation of the top of the gates of the lock was 123 feet.

46. The specifications required that the river bank downstream from the lock should be protected from erosion by rip-rap and other means.

Sometime in November 1935 plaintiff had been informed by the contracting officer, during a discussion as to the possibility of opening the gates of the lock in case of a flood, that he would not permit the gates to be opened until the bank downstream from the lock had been fully protected as required by the specifications. The reason assigned therefor was to prevent danger of a wash-out behind the land wall of the lock, which might cause the lock wall to settle.

On January 2, 1936 a portion of the riprap required had not been placed at a point which in the judgment of the contracting officer was a critical point.

47. On receiving reports that the river was rising some distance above the dam, indicating that flood stages would be reached, plaintiff requested defendant's resident engineer for permission to open the lock gates. The resident engineer communicated with the contracting officer by long distance

telephone requesting instructions. He informed the contracting officer that the riprap on the bank below the lock had not been completed. He was informed by the contracting officer that consideration would be given the plaintiff's request, and in the afternoon of the same day he was advised by the contracting officer that he was sending a representative to the site to investigate the conditions. The contracting officer's representative arrived at about noon on the following day. In the meantime the plaintiff had placed sufficient rock at the critical points on the bank below the lock to remove danger of erosion, and permission was granted to open the gates of the lock. At that time, however, the stage of the river was so high that the water pressure against the gates made it impossible for the plaintiff to open them with the equipment on hand, and the gates were never opened.

48. As a result of the flood, the river bed eroded from a natural elevation of 85 feet to an elevation of 61 feet, the deepest point being underneath cell No. 7. The scour completely undercut cell No. 7, and partially undercut cells 5 and 6, causing the earth fill in these cells to run out and the walls of the cells to be damaged, necessitating their removal and replacement. Cell No. 4 also required some repair and refilling.

49. The contributing causes of this scouring were: (1) the failure to open the lock gates; (2) the failure to berm the cells in the cofferdam; and (3) the failure to remove the earth from the lock cofferdam. Had the gates been opened, had the berm been placed on the cells of the cofferdam for the dam, and had the earth from the lock cofferdam been removed, but little damage, if any, to the cofferdam would have been done.

50. After the flood, and on January 16, 1936, plaintiff requested payment of the cost of replacing the cells that had been damaged, and also the cost of the longer sheet steel piles for the remaining cells to be constructed as a result of the scouring of the bed of the river, basing its request on the ground, first, that the failure to permit the opening of the lock gates caused the scour; and second, that the flood was of unusual magnitude and duration, and that

the change in the river bottom caused thereby was a change in subsurface conditions calling for an equitable adjustment under the provisions of articles 3 and 4 of the contract. There is no evidence that the river bottom before the flood was in any respect different from that it was represented to be by the defendant.

In reply, the contracting officer directed plaintiff to proceed with the construction of the cofferdam and stated that the matter of compensation would be left to later adjustment. On February 19, 1936 the contracting officer notified plaintiff by letter that it was not entitled to compensation for the additional work necessitated by the flood. On March 4, 1936 plaintiff protested against this ruling and appealed therefrom to the head of the department. On March 6, 1936 the Chief of Engineers sustained the ruling of the contracting officer, and so advised the plaintiff.

51. The contracting officer requested plaintiff to submit for his approval revisions to be made in the cofferdam on account of the scour. This plaintiff did by letter of January 27, 1936. This was approved by the contracting officer. These revisions related not only to cells 4, 5, 6, and 7, but also showed that longer sheet steel piling was required for the remaining cells 8 to 13, resulting from the scouring of the bed of the river. Plaintiff's revision also provided for two additional cells, 1A and 2A, and a cut-off cell consisting of 39 pieces of sheet steel piling in the bank on the upstream side of the cofferdam. These revisions, however, were not necessitated by the damage done by the flood. The cost of removal and replacement of the damaged cells, the additional cost of using more sheet steel piling in driving cells 8 to 13, resulting from the scouring of the riverbed, and the cost of making certain additional fills resulting therefrom, amounted to $13,894.23, itemized as follows:

Removing and filling cells 4, 5, 6, and 7, and refilling river adjacent to said cells	4, 872. 92
Driving extra length sheet steel piling in cells 8, 9, 10, 11, 12, and 13	495. 50
Extra fill in cells 8, 9, 10, 11, 12, and 13 on account of extra length sheet steel piling	414. 73
Additional sheet steel piling for cells 4, 5, 6, and 7	3, 244. 39
Additional sheet steel piling for cells 8, 9, 10, 11, 12, and 13	4, 866. 69

The cost of driving and filling cells 1A and 2A, and the cost of constructing the cut-off wall amounted to $2,238.54.

52. In its letter of May 28, 1937 plaintiff made claim for the extra cost herein asserted, along with other claims made. This was denied by the Chief of Engineers on November 10, 1937.

CLAIM NO. 6.—ADDITIONAL PAYMENT FOR FLOODING OF THE COFFERDAM DURING PERIOD FROM MARCH 25, 1936, TO APRIL 16, 1936

53. This claim is for $2,500 for a flooding of the cofferdam during the period from March 25, 1936, to April 16, 1936, during which time the river twice exceeded the stage of 115 feet. Plaintiff has been paid $2,500 for the flood during this period, but sues to recover an additional $2,500 on the ground that there were two floods.

54. During the period in question the stages of the river were as follows:

March 25, 1936	115 feet
March 27, 1936	120.4 feet
March 31, 1936 (3:30 a. m.)	115 feet
March 31, 1936 (11:00 a. m.)	114 feet
April 1, 1936 (9:00 a. m.)	112 feet
April 2, 1936	115 feet
April 8, 1936	126.8 feet
April 16, 1936	115 feet

When the river receded to 115 feet on March 31, 1936 plaintiff resumed work at 11:00 a. m. on that date. It continued work until April 1, 1936 at 11:00 p. m., when work was stopped on account of another rise in the river. The work was not resumed again until after April 16, 1936.

55. Prior to the flood plaintiff was carrying on its pumping operations within the cofferdam, installing pump sumps below subgrade to dry up the bottom of the cofferdam, installing a well-point system to take care of infiltration of water along the bank, and excavating with the use of a dragline in the cofferdam, and removing from the cofferdam the earth piled adjacent to the inside wall of the cofferdam with a dragline. This was done with a derrick scour.

56. When work was resumed on March 31, 1936, and up until plaintiff again stopped work on April 1, 1936 at 11:00 p. m., plaintiff was engaged in pumping out the cofferdam, continuing the installation of the pump sumps, cleaning and

putting in order the dragline machine preparatory to its operation, and the derrick scow was removing the dirt which had been piled next to the inside wall of the cofferdam by the dragline. The dragline not having been reconditioned, it had not resumed operation.

57. The applicable provision of the specifications reads as follows:

> 1–06. *Monetary allowance for high river stage.* In the event that work remains to be done and is actually in progress within any section of cofferdam on the lock and/or dam and the Savannah River stage reaches an elevation of 115.0 feet as determined by a gage located 500 feet below the crest of the dam (see paragraph 1–03 (b)), an allowance of $2,500.00 will be made to the contractor upon full resumption of the work on the lock and/or dam, subject to the following: Only one allowance will be made for a rise; * * *.

58. A voucher providing for the payment of $2,500 on account of the high water from March 25, 1936 to April 16, 1936 was prepared by the defendant's representative and presented to plaintiff for signature. Plaintiff signed it and returned it to the contracting officer on April 23, 1936. The controversy was referred to the Chief of Engineers, who on July 7, 1936 rejected the claim on the ground that there was not a full resumption of work between the two floods.

59. This claim was again submitted to the contracting officer and the Chief of Engineers by plaintiff's letter of May 28, 1937, with supporting data. It was again rejected by the Chief of Engineers on November 10, 1937.

CLAIM NO. 7.—ADDITIONAL COST OF PERMANENT SHEET STEEL PILING CUT-OFF WALL UNDER DAM

60. Provisions of the specifications pertinent to this claim read as follows:

> 2–01. *Cofferdams.*—(a) * * *
> (2) *Dam.*—The dam shall be constructed in not less than two successive cofferdams starting at the abutment and inclosing such lengths of the dam as may be proposed by the contractor and approved by the contracting officer.

(b) *Type.* * * * Where a succeeding cofferdam joins a completed section of the dam, a wall of sheet steel piling extending to elevation 71.5 shall be permanently installed under the masonry of the dam in a line perpendicular to the cut-off walls at the upstream and downstream sides of the dam, to which walls it shall be connected, and arranged to join the deep driven wall of the cofferdam so as to complete the cofferdam inclosure. * * *

61. The dam in question was constructed within two cofferdams, requiring the installation of one cut-off wall. This wall, about 88 feet in length, was driven within the cofferdam for the first section of the dam after it had been pumped out and the excavation carried to subgrade. The function of this wall was to prevent seepage through the bed of the river into the next cofferdam. It was required that this sheet steel wall should be driven to an elevation of 71.5 feet. The top of it was required to be 87 feet, requiring the installation of piling 17 feet long. Plaintiff submitted to the contracting officer plans showing piling of such length, which plans were approved.

In view of the scouring of the river, mentioned under the fifth claim, plaintiff found it necessary to use piling 34 feet long, instead of 17 feet long. Piling 34 feet in length was not ordered by the contracting officer in writing or otherwise, but it was installed by plaintiff of its own volition because it conceived such lengths to be necessary. The cost of using the extra length piling was $1,455.90.

62. No claim for additional compensation was made by plaintiff until its letter of May 28, 1937 to the contracting officer. This claim was denied by the Chief of Engineers on November 10, 1937.

CLAIM NO. 8.—FLOOD DAMAGE TO SECOND COFFERDAM FOR THE DAM

63. This claim is for the costs incurred by plaintiff in restoring cell B of the second cofferdam for the dam, which collapsed at 4 a. m. August 31, 1936. The layout plan for the second dam cofferdam was approved by the contracting officer July 16, 1936. In the construction of the second

dam cofferdam cells A, B, and C connected cell 5 and pier 3 of the dam. Cells A, B, and C were constructed within the first dam cofferdam on unwatered ground.

64. The second cofferdam for the dam was practically completed about a week before August 31, 1936. Plaintiff installed pumps and started to pump out the cofferdam. There were some leaks in cells A, C, and F. On August 30, 1936 the river commenced to rise and reached an elevation of 112.9 during the morning of August 31. The normal stage of the river was elevation 104, approximately. At the time cell B collapsed at 4 a. m. August 31, the elevation of water within the cofferdam was about 25 feet below the elevation of the water outside the cofferdam. The resulting pressure caused cell B to collapse.

65. Investigation after the collapse of cell B disclosed there was considerable erosion in the bed of the river in front of spillway gate No. 4 and at the location of cell B. Whether this erosion occurred before the collapse of cell B or was caused by the inrush of water after the collapse of cell B cannot be determined from the evidence. There were defects in the construction of cells A, B, and C.

66. After the collapse of cell B plaintiff proceeded to remove the debris and to reconstruct the cell. Plaintiff did this without protest or making any claim at the time to officers of defendant that it be reimbursed for the cost of reconstruction. Plaintiff did not furnish the defendant with costs incurred while cell B was being reconstructed.

67. The costs incurred by plaintiff in repairing the damage caused by the collapse of cell B on the morning of August 31, 1936, was $5,477.30.

68. The first claim asserted by plaintiff for payment of the costs of repairing the damage to the cofferdam was in its letter of May 28, 1937. Supporting data on appeal were submitted on October 11, 1937. The Chief of Engineers in his letter of November 10, 1937 denied the claim.

CLAIM NO. 9.—COST OF ADDITIONAL CEMENT USED IN CONCRETE

69. Plaintiff in this claim seeks to recover the value of the cement used in excess of the minimum of 4.5 bags per cubic

yard of concrete specified for Class B concrete by article 5–13 (d) of the specifications, which reads as follows:

> (d) *Cement content.*—Each cubic yard of concrete shall contain not less than the quantity of cement stated below:
>
> Class "A"________________________ 5.5 bags or 517 pounds
> Class "B"________________________ 4.5 bags or 423 pounds
>
> * * * * *

70. On October 11, 1934, Change Order No. 1 was issued, which revised the specifications for concrete by substituting Section V, paragraph 5–01 to paragraph 5–23, inclusive, of Change Order No. 1, for Section V, paragraph 5–01 to paragraph 5–23, inclusive, of the specifications.

The quality and other requirements of the materials to be used in making concrete are set out in paragraphs 5–05 to 5–12, inclusive.

71. Paragraph 5–12 of Change Order No. 1 reads, in part, as follows:

> 5–12. *Sampling and testing Aggregates.* * * * The source from which concrete aggregates are to be obtained shall be selected by the contractor well in advance of the time when they will be required in the work, and suitable samples, as they are to be used in the concrete, shall be furnished to the contracting officer at least 30 days in advance of the time when the pouring of the concrete is expected to begin.

The supply of gravel of the proper varying sizes required was inadequate near the site of the lock and dam. On January 6, 1935 plaintiff wrote to the contracting officer a letter as follows:

> We have located in the vicinity of Augusta an ample supply of gravel suitable for use as concrete aggregate, but our screen tests indicate that only 10 to 12% of this material is retained on the ¾ screen.
>
> In order to meet the requirements of Paragraph 5–07 (C) it is necessary that we provide some larger aggregate for mixing with the ¾ gravel, but there is apparently no supply of large gravel available in this vicinity. We, therefore, respectfully request that we be permitted to use crushed stone and gravel in combination for the coarse aggregate. * * *

On January 8, 1936, the contracting officer replied as follows:

> In reply to your letter dated January 6, 1935, this is to advise that the use of crushed stone and gravel, in combination, for the coarse aggregate to be used in the concrete for the construction of the New Savannah Bluff lock and dam is authorized, subject to all the requirements of Par. 5–07 of our specifications for this work.

72. Plaintiff furnished the contracting officer with samples of fine aggregate consisting of sand, and of coarse aggregate consisting of gravel and crushed stone. With these samples trial mixes were made at the lock site by defendant's concrete technician, and he determined that to get a satisfactory concrete with these samples it would be necessary to use 4.7 bags of cement per cubic yard of concrete, and that information was passed on to the plaintiff.

The pouring of concrete started in the lock on June 24, 1935. From that date until August 8, 1935 all the concrete placed contained 4.7 bags of cement for every cubic yard of concrete, to which the plaintiff made no protest.

73. On August 8, 1935, the contracting officer, after an inspection tour of the lock and dam and after he had found a portion of it honeycombed, informed the plaintiff that, in order to get proper workability of the concrete, the cement content of the concrete would have to be increased to a minimum of 5 bags for every cubic yard of concrete. Later in the day plaintiff wrote a letter of protest to the contracting officer, which reads as follows:

> We acknowledge receipt of your verbal instructions as of this date to increase the amount of cement in a cubic yard of concrete from the minimum of four and one-half bags as provided in your specifications, to a minimum of five bags, without additional compensation.
>
> We wish to advise you that we will obey your instructions, but will do so only under protest, and we reserve the right to ask that we be compensated for all cement used in the concrete mixture over and above four and one-half bags per cubic yard, as it is our opinion, based on tests which have been made to date, that four and one-half bags of cement will give us a three thousand pound concrete in twenty-eight days.

74. On August 9, 1935, the contracting officer wrote the following letter to the plaintiff:

> Receipt is acknowledged of your letter of August 8, 1935, protesting my verbal instructions to increase the amount of cement per cubic yard of concrete without additional compensation.
>
> In view of your protest, the following written instructions are substituted for the verbal instructions referred to. Under the provisions of par. 5–13, "all concrete materials will be proportioned so as to produce a workable mixture in which the water content will not exceed the maximum specified" and "the proportions will be changed whenever in the opinion of the contracting officer such change becomes necessary to obtain the specified strength and the desired density, uniformity and workability, and the contractor will not be compensated because of such changes.
>
> It has been determined that the concrete now being placed does not have the required workability. You will therefore take suitable measures to bring the workability up to a satisfactory standard. You are at liberty to accomplish this either by furnishing more suitably graded aggregates, or by the addition of pozzuolanic material in conformity with par. 5–09 of the specifications, if you prefer to do either of these things rather than to increase the cement content.
>
> Pending a change in the aggregates or the furnishing of some added material to improve workability, you are directed to use 5 bags of cement per cubic yard of concrete, and you are advised that you will not be compensated for this change in proportions.

From this direction of the contracting officer the plaintiff did not take a written appeal within thirty days.

The possibility of furnishing pozzuolanic material was investigated by plaintiff and found impractical, as the cost of redesigning the mixing plant to incorporate that material with other materials required in the mix would cost more than it would cost to use an increased quantity of cement.

75. After plaintiff decided not to use pozzuolanic material, the choice then before plaintiff to comply with the instructions of the contracting officer was either to furnish more suitably graded aggregates, that is, aggregates of uniform gradation from big to little, or to increase the quantity of cement. Plaintiff decided to proceed with the use of the aggregates available and to increase the quantity of cement.

With fine and coarse aggregates properly graded a satisfactory concrete could have been produced with 4.5 bags of cement to each cubic yard of concrete.

76. Two subparagraphs of the specifications on proportioning concrete materials read as follows:

> 5-13. *Proportioning.*—
>
> (a) *Basis.*—All concrete materials will be proportioned so as to produce a workable mixture in which the water content will not exceed the maximum specified.
>
> (b) *Control.*—The exact proportions of all materials entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all materials entering into the concrete. The proportions will be changed whenever in the opinion of the contracting officer such change becomes necessary to obtain the specified strength and the desired density, uniformity and workability, and the contractor will not be compensated because of such changes.

77. The maximum quantity of water allowed by the specifications for class "B" concrete was 6.5 gallons per bag of cement. The proportioning of the concrete materials for the mixes as determined by defendant's concrete technician was supervised by defendant's inspectors who measured the quantity of water as well as the quantities of other materials to go into each mix. At times less than 6.5 gallons of water per bag of cement was used. To this plaintiff made complaints, but filed no protest. The workability of the concrete at times could have been improved by the addition of water, but with the aggregates available would not have resulted in materially reducing the quantity of cement required.

78. To August 8, 1935, plaintiff poured 9,472.4 cubic yards of class "B" concrete, and after August 8, 1935, 37,625.11 cubic yards. In the concrete poured to August 8, plaintiff was directed to use 4.7 bags of cement per cubic yard of concrete, which was 0.2 bag of cement per cubic yard of concrete more than the minimum of 4.5 bags of cement per cubic yard of concrete required by the specifications, and after August 8, 0.5 bag of cement per cubic yard of concrete

more than the minimum required by the specifications. The amount of cement used above the minimum required by the specifications during the first period was 1,894.48 bags, or 473.62 barrels, and during the second period 18,812.56 bags, or 4,703.14 barrels. The cost of the cement to plaintiff was $2.26 per barrel.

79. The first claim asserted by plaintiff for payment of cost of additional cement used in concrete was in its letter of May 28, 1937. Supporting data on appeal were submitted on October 11, 1937. The Chief of Engineers in his letter of November 10, 1937, denied the claim.

CLAIM NO. 10.—ADDITIONAL COST IN MAKING FILL UPSTREAM FROM DAM

80. On November 21, 1936, the contract was modified, with the consent of the plaintiff, by change order No. 20, paragraph (a) of which reads as follows:

> (a) Fill with sand or other suitable material to form a berm extending from the upstream edge of the dam for a distance of approximately 25 ft. upstream, and from the abutment pier of the dam to the cofferdam at pier No. 3 or beyond as directed, the top of the berm to be at elevation 95 M. S. L., or at such lesser elevation as may be directed by the contracting officer, and the upstream slope of the berm to be the natural slope of the material. In event a freshet should remove any material before completion of the fill and protection, the contractor will be paid for the material thus removed, as determined by a survey made before and after the freshet.

At this time the section of the dam on the South Carolina side of the river had been completed, and the cofferdam for the second section of the dam was in place. The flow of the river was through spillway gates Nos. 4 and 5.

81. The contracting officer suggested to plaintiff that the fill be made by the hydraulic process, to which suggestion plaintiff agreed and began pumping operations on November 22, 1936, which were continued until December 2, 1936. At the time this change order was agreed to it was understood by both parties that some of the material pumped in would be carried out by the current, but when the

pumping operations were being carried on it was discovered that a large amount of the material was being carried out by the current. Accordingly, on November 30, 1936, plaintiff's project manager asked defendant's resident engineer for permission to stop pumping operations. This request reached the contracting officer on December 2, 1936, and on that date authority to discontinue such operations was granted. There was no freshet between November 22, 1936 and December 2, 1936.

82. In Change Order No. 20 it was estimated that it would require 12,000 cubic yards of material to form the berm referred to in paragraph (a) thereof, set out in finding 80. After the pumping was discontinued measurement showed that the material which remained in place amounted to 1,749 cubic yards, for which plaintiff was paid on December 16, 1936, at the rate of 20 cents per cubic yard, the sum of $349.80. This sum was accepted by plaintiff without protest.

83. The cost to plaintiff of these pumping operations was $795.59, and plaintiff sues for the difference between this sum and the sum paid it, $349.80, claiming that it is entitled to this additional amount under paragraph 1-12 of the specifications providing for the payment of extra work not covered by articles 3 and 4 of the contract.

84. Plaintiff first demanded payment on this claim in its letter of May 28, 1937. On October 11, 1937 plaintiff on appeal submitted supporting data. The Chief of Engineers denied this claim in his letter of November 10, 1937.

CLAIM NO. 11.—ADDITIONAL COST OF REHANDLING RIPRAP STONE UNDER CHANGE ORDER NO. 20

85. Paragraph (d) of Change Order No. 20, referred to in finding 80, reads as follows:

> (d) Place riprap below the dam abutment on the South Carolina bank of the river under water and on the bank, as directed.

A portion of the riprap stone was to be placed on a protective mattress, which was to be constructed and launched by the defendant. The mattress was about 80

feet wide and 500 feet long and required 4 carloads of stone to sink it, and an additional 4 carloads of stone to anchor it permanently. It was necessary to order the stone in advance of the date needed in order to have it delivered from the quarry.

86. On or about December 14, 1936, the plaintiff was orally directed by the resident engineer to have available not later than December 28, 1936, 8 carloads of stone to sink and to anchor the mattress. The mattress was completed and ready to be placed on the river bank on December 29, 1936.

87. December 31, 1936, 6 carloads of stone were delivered at the site of the work on the Georgia side. On the morning of December 31, defendant had available a force of laborers for placing the mattress in position for sinking, which could have been done in about one hour's time. The plaintiff made no request that morning that the mattress be placed in position for sinking, and the plaintiff on that date made no attempt to unload the stone from the cars onto barges preparatory to placing it on the mattress.

88. December 31, 1936 fell on Friday. Because of the New Year holiday, commencing at noon on that date and continuing through January 3, 1937, work was suspended during this period. During that time the plaintiff did not request the defendant to launch the mattress. A rise in the river started on December 30, 1936, which reached its crest on January 2, 1937 at elevation 116. The riprap stone was not placed on the mattress until January 15, 1937. The plaintiff unloaded the stone from two of the cars on January 1, 1937, and unloaded the remainder on January 8, 1937. It, however, did not unload them onto the barges, but instead onto the ground, and later removed the stone from the ground to the barges. This extra handling of the stone cost the plaintiff the sum of $400.76, for which amount this claim is filed.

89. The first claim for this was made in plaintiff's letter of May 28, 1937. October 11, 1937 plaintiff on appeal submitted supporting data. The Chief of Engineers denied this claim in his letter of November 10, 1937.

CLAIM NO. 12.—ADDITIONAL COST OF REPAVING ESPLANADE OF LOCK

90. The contract drawings contemplated that the area between the land wall of the lock and the natural bank of the river be filled in and an esplanade 43 feet wide and 600 feet long be constructed thereon of concrete 6 inches thick in 5-foot squares.

91. The portion of the esplanade in controversy was laid the latter part of July 1936. About the middle of November 1936 it appeared that a portion of the concrete-paved esplanade had been damaged because of settlement of the fill on which it rested. This fill had been constructed by the plaintiff in accordance with the requirements of paragraph 3–04 of the specifications.

92. This fill was made by the hydraulic process with sand pumped out of the river. This left the fill back of the land wall of the lock uneven. It was levelled off by the use of a dragline. The material dragged in on that portion of the fill below grade was loose, and had to be settled before paving.

93. Paragraph 5–14 (d) (2) of the specifications reads as follows:

> (2) Unless otherwise specified, all concrete shall be placed in the dry upon clean, damp surfaces, free from running water, and never upon soft mud, dry porous earth, or upon fills that have not been subjected to approved puddling or tamping so that ultimate settlement has occurred.

94. A few days before the paving of this portion of the esplanade was begun the project manager of plaintiff and the resident engineer of the defendant had an understanding that the material should be settled by running water thereon from a hose until approved by the resident engineer. Before the resident engineer's approval, plaintiff started the paving. The resident engineer advised plaintiff's superintendent in charge of this work that such paving, under the circumstances, would be made on plaintiff's responsibility.

95. On December 16, 1936, the contracting officer wrote a letter to plaintiff as follows:

> There is enclosed white print SRB 2–3, sheet # 1, showing in red that portion of the concrete paved esplanade which has been damaged because of excessive settlement of the back fill, which was not properly compacted before the paving was placed.
>
> The work to be done under our contract No. W–819–Eng–412 will not be accepted as complete until you have restored this pavement in good condition to the elevation and grade shown on the contract plans.

On December 19, 1936 plaintiff wrote a letter to the construction engineer protesting the ruling in the foregoing letter.

96. In a letter dated January 8, 1937 the contracting officer wrote plaintiff that he adhered to his ruling in his letter of December 16, 1936.

The matter was appealed by plaintiff to the Chief of Engineers. On January 21, 1937, the contracting officer wrote a letter to plaintiff advising plaintiff that the "Chief of Engineers has rendered a decision * * * that work to be done under contract * * * will not be accepted as completed until you have restored the portion of the esplanade paving which has been damaged because of excessive settlement of the back fill."

On January 25, 1937, plaintiff wrote the contracting officer a letter, the last paragraph of which reads as follows:

> We respectfully advise that we will restore the work in question, as ordered by you, but we reserve the right to keep an accurate cost of the work and make a claim for payment as an Extra Work item, payment to be made as provided for in Paragraph 1–12 of the Specifications.

97. The cost to plaintiff of restoring the portion of the esplanade paving which had been damaged because of settlement of the back fill was $537.22.

98. This claim was included in plaintiff's letter of May 28, 1937, heretofore referred to, and was again denied by the Chief of Engineers on November 10, 1937.

The court decided that the plaintiff was entitled to recover only on Claim No. 3.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant on twelve different claims, as set out in the findings of fact. These claims will be discussed in order.

CLAIM NO. 1.—ADDITIONAL COST FOR CONCRETE FORMS IN DAM ON ACCOUNT OF ALLEGED CHANGES IN CONTRACT DRAWINGS

Plaintiff sues for the cost of the additional concrete forms necessitated by the installation in the dam of chain storage recesses, and recesses for a pick-up device.

The defendant defends first on the ground that plaintiff did not protest at the time it was required to put in the chain storage recesses and the recesses for the pick-up device, as required by the contract. It is true that the contract required that any claim for adjustment for a change made should be asserted within ten days from the date the change was ordered, "unless the contracting officer shall for proper cause extend such time"; but, although no protest was made, the contracting officer considered on its merits this claim set out in plaintiff's letter of May 28, 1937. The provision requiring protest within ten days was a provision inserted for the benefit of the defendant and, of course, could be waived by it. The consideration of the claim on the merits, without any mention of the fact that it had been filed too late, was a waiver of this contract provision. *Thompson* v. *United States*, 91 C. Cls. 166, 179; *Callahan Construction Company* v. *United States*, 91 C. Cls. 538, 610.

The defendant says that our decision in *Johnson* v. *United States*, 94 C. Cls. 175, 202, is in conflict with the foregoing decisions and states the correct rule. It is true that in the *Johnson* case, as in the *Thompson* and *Callahan Construction Company* cases, the contracting officer and the head of the department did hear the plaintiff's claims, although there had been no timely protest, but the opinion in the *Johnson* case states they did so without waiving the failure to protest. On the other hand, in the *Thompson* and *Callahan Construction Company* cases

there was a consideration of the claims on the merits without any reservation of the right to rely on the failure to protest. From this we held that a waiver was to be implied; but, of course, a waiver cannot be implied if there is an express statement that the provision for protest is not being waived, or if there are other facts in the case to rebut the implication of a waiver arising from the consideration of the claims on the merits. In the *Johnson* case we concluded there were present facts which we thought rebutted this implication.

In the case at bar the contracting officer considered the claim on its merits without any mention of the fact that the protest had not been filed as required by the contract. There was no indication that he was relying on this provision of the contract. His action in considering the claim on the merits without any mention of this provision of the contract is a clear indication that he did not intend to rely on it, but waived it.

The drawings, referred to in this case as "plates", called for chain storage recesses and for recesses for a pick-up device. Plaintiff knew that it would be necessary for it to provide for these recesses, and with this knowledge it put in its bid for doing the work, although specifications for the recesses were not furnished. The specifications furnished later were such as plaintiff could reasonably have expected when it put in its bid. The recesses were called for by the contract and were not an addition thereto. The Chief of Engineers, therefore, correctly ruled that plaintiff was not entitled to additional compensation therefor.

On the other hand, the control rooms and the bearing plate recesses were not called for by the original contract and, therefore, the Chief of Engineers allowed plaintiff additional compensation for their installation.

It results that plaintiff is not entitled to recover on this claim.

CLAIM NO. 2—TIMBER PILE CUT-OFFS

On this claim the plaintiff sues for $1,312.50 for 9,722.22 linear feet of piling cut off above the prescribed elevation, in addition to the amount allowed. The amount of 5,911.22 linear feet of the 9,722.22 linear feet was cut off

in the storage yard before the piles were placed in the pile driver leads; the balance represents 1 foot on each of the 3,811 piles driven which was cut off on account of brooming, for which no payment was made.

As he was authorized to do by the specifications, the contracting officer on April 25, 1935 prescribed that certain piles should be driven to a depth of 30 feet below the cut-off elevation, and certain others to a depth of 20 feet below the cut-off elevation, subject to change as provided for in section 4–03 (a) of the specifications, which provided in part:

> * * * where driving conditions clearly indicate that piles of lengths directed cannot be satisfactorily driven shorter lengths may be furnished by mutual agreement between the contractor and the contracting officer.

When the piles were actually driven it was found that they could not be driven to the length specified by the contracting officer; whereupon, the contracting officer and plaintiff's project manager agreed that the defendant's resident engineer should be authorized to prescribe from time to time the depth to which the piles should be driven, and that the plaintiff should be paid for the lengths designated by the resident engineer. The plaintiff continued under this arrangement until June 8, 1935, at which time only 700 of the total of 3,811 piles remained to be driven, when the contracting officer wrote plaintiff specifying the depths to which the remaining piles should be driven, subject to change as provided for in section 4–03 (a), quoted above.

Piles were placed in the pile driver leads in accordance with the lengths designated from time to time by the resident engineer. The defendant kept a record of these lengths, the accuracy of which the plaintiff does not dispute, and plaintiff has been paid on the basis of these lengths at the contract rate of 27 cents per linear foot driven below the cut-off elevation, and 13.5 cents per linear foot above the cut-off elevation, less 1 foot cut-off on account of brooming. The plaintiff claims, in addition, the number of feet cut off in its storage yard before the piles were placed in the pile driver leads and, in addition, for the 1 foot cut off for brooming.

So far as plaintiff's claim for the amount cut off in the storage yard is concerned, it seems plain to us that it is not entitled to recover, in view of the agreement between the parties that the resident engineer should designate the depth to which the piles were to be driven, and that the plaintiff should be paid on the basis of these lengths. The length of the piles placed in the pile driver leads was in accordance with the depth to which they should have been driven as prescribed by the resident engineer. The contract provided that where piles of certain lengths had been placed in the pile driver leads and it was found that they could not be driven to the depth specified, the plaintiff should be paid for them at 27 cents a linear foot below the cut-off elevation, and 13.5 cents per linear foot above the cut-off elevation. The plaintiff was paid in exact accordance therewith, except that the defendant did not pay for the 1 foot which it was necessary to cut off on account of brooming.

We are of opinion also that the plaintiff is not entitled to be paid for this 1 foot cut off for brooming. The contract provided that the piles should be driven to the specified depth "without injury to the pile," and it also provided that "after driving, all piles shall be cut off square at the elevation shown on the drawings." The force of the pile driver on the pile caused the top of it to splinter. This is called brooming. In order to comply with the specifications that the piles should not be injured and should be cut off square at the elevation shown, it was necessary to cut off the part of it that had broomed. The proof shows that about 1 foot of a pile driven to the depth these piles were driven will broom. This is the amount deducted by the defendant from the lengths of the piles placed into the pile driver leads.

The plaintiff is not entitled to recover on this claim.

CLAIM NO. 3.—ADDITIONAL COST OF EXPANSION AND CONTRACTION JOINTS IN LOCK

Plaintiff sues for the sum of $1,726.18, the cost of installing expansion and contraction joints between the vertical joints of the monoliths of concrete in the lock walls.

Before placing these monoliths plaintiff prepared a monolith layout plan for the lock walls, which was approved by the contracting officer on June 3, 1935. At this time the question was raised as to whether or not the joints between the monoliths should be ordinary joints or expansion and contraction joints. The contracting officer ruled that they should be expansion and contraction joints, but since such joints were not shown by the plans and specifications, he issued a change order providing therefor, and providing that the plaintiff should be paid therefor the sum of $1,765.00. This was accepted by the plaintiff.

However, because the cost was more than $500.00, it was necessary for this change order to be submitted to the head of the department. When so submitted, the head of the department ruled that it was "customary and desirable" that expansion joints be used and, therefore, that the plaintiff was not entitled to compensation therefor. He did not rule that these expansion joints were provided for by the plans and specifications. He ruled merely that they were "customary and desirable."

The contract did not call for these expansion joints at these places and his requirement that plaintiff install them was a requirement outside of the contract, for the cost of which plaintiff is entitled to be paid.

The defendant does not defend here on the ground that these joints were called for by the contract. It merely says, as did the Chief of Engineers, that they were customary and desirable, but whether or not they were customary and desirable is entirely immaterial. The material inquiry is whether or not they were called for by the contract. It is admitted that they were not.

The defendant also defends on the ground that no appeal was taken to the head of the department. This defense is not good. It was the head of the department who had made the ruling of which plaintiff complains and, therefore, the provision for an appeal to him from a ruling of the contracting officer has no application. Plaintiff protested against his action; it did not acquiesce therein; and finally, when the work was completed, it again presented its claim to the contracting officer and the head of the department; it was considered by them, and was again denied.

The plaintiff has sufficiently complied with all provisions of the contract. It is, therefore, entitled to recover the sum of $1,726.18 on this claim.

CLAIM NO. 4.—REPAIRS TO LOCK CONCRETE

Plaintiff sues for $229.49, the cost of repairing a portion of the concrete in monolith L–6–B which was honeycombed. There is some controversy between the parties as to the cause of the honeycombing, the plaintiff contending that the mix specified by the defendant was too dry, and the defendant insisting that it was caused by a failure of the plaintiff to properly vibrate the concrete.

However this may be, the proof shows without controversy that the plaintiff made the repairs required without any protest, and made no claim for extra compensation therefor until the conclusion of the work on May 28, 1937, nearly two years after this work had been done. It was plainly an afterthought. In addition, other concrete poured of the same mix did not honeycomb, and plaintiff's claim, therefore, that the fault was due to improper specifications is not sustained.

For these reasons we are of opinion that plaintiff is not entitled to recover on this claim.

CLAIM NO. 5.—FLOOD DAMAGE TO FIRST COFFERDAM FOR THE DAM

On January 3, 1936, there was a flood in the Savannah River. At this time the plaintiff had completely constructed the first six cells of the cofferdam for the first section of the dam, and the seventh one had been completed, except that it was only three-fourths full of dirt. The flood scoured out the bed of the river underneath the fifth, sixth, and seventh cells, and damaged the cell walls to such an extent that they had to be removed and replaced. It also damaged to some extent cell No. 4. The plaintiff asks compensation therefor alleging: (1) that it is entitled to an equitable adjustment under articles 3 and 4 of the contract on account of changed conditions materially different from those set forth in the plans and specifications; and (2) that the damage was caused by the refusal of the defendant to permit the opening of the gates to the lock.

Plaintiff's first position is plainly untenable. Article 4

provides: "Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called" thereto and the drawings and specifications changed; and if any increase or decrease of the cost results therefrom it shall be equitably adjusted.

At the time cells 4, 5, 6, and 7 had been constructed the bed of the river was no different from what it was when the plans and specifications were drawn. The later change was brought about by an act of nature during the progress of the work. This provision of the contract refers to a latent condition existing at the time the contract was entered into, not to one occurring thereafter. The condition of the bed of the river until the flood was the same as that it had been represented to be before the contract was signed.

The damage resulted from an act of God. The defendant was in no way responsible therefor, unless its failure to permit the gates of the lock to be opened contributed to the damage. If so, and if it was its duty under the circumstances to permit the gates of the lock to be opened, the defendant should respond in damages.

From a reading of the record we are convinced that the failure to open the gates did contribute to the damage. It is true that defendant's resident engineer expressed the opinion that the damage would have resulted whether or not the gates had been opened, but we cannot agree that this is so. The width of the river, normally 450 feet, had been reduced to 160 feet between the lock on the Georgia side of the river and cell No. 7 on the South Carolina side. The width of the lock was 56 feet. If these gates had been opened, the space within which the water could have flowed would have been increased from 160 feet to 216 feet after the river had risen to a stage of 101 feet, the lower level of the upstream gate sill of the lock. This necessarily would have decreased the velocity at any one point. Although the proof shows that there would have been some scouring even with the gates of the lock open, nevertheless, it stands to reason that there would have been less scour had the gates been opened, because there would have been less

velocity. Certainly, failure of the defendant to open the gates did contribute to the damage.

But the defendant says that it was justified in refusing to open the gates. Sometime prior to the flood and in anticipation of a possible flood, the plaintiff had requested permission to open these gates in case a flood should occur. The contracting officer told the plaintiff he would not permit the gates to be opened until the bank below the locks had been protected from erosion, because of the danger of undermining the land wall of the lock. At the time of the flood the plaintiff had not completed the protection of this bank. It was exposed at a point which in the judgment of the contracting officer was a critical point, the erosion of which might have undermined the land wall of the lock.

On the morning of January 2, 1936, when the flood was imminent, the resident engineer called the contracting officer transmitting plaintiff's request that the gates be opened, and informing the contracting officer that these critical points had not yet been protected by the plaintiff. The contracting officer replied that he would give the matter consideration. Shortly thereafter during the day he called the resident engineer and informed him that he was sending a man down to investigate the condition. By the time this man arrived at noon on the day following the plaintiff had protected the bank at these critical points and permission was given to open the gates. When it undertook to do so, the pressure of the water was so great that they could not do so with the equipment at hand, and the gates were never opened.

It was the duty of the contracting officer to protect the work that had been completed and paid for in part. He was required to permit no act to be done which reasonably might result in damage to it.

Plaintiff had ample opportunity to properly protect the bank, but had chosen to do other work instead. The condition which, in the opinion of the contracting officer, made it dangerous to open the gates was a condition which plaintiff could have prevented. Having been forewarned by the contracting officer that permission would not be given to open these gates until this condition was remedied, plaintiff cannot complain that permission was refused.

Moreover, the specifications required the plaintiff to berm with stone each cofferdam "wherever scour from flowing water or eddy water is likely to occur." Plaintiff had not done this, and the proof shows that had these cells of the cofferdam been bermed with stone, the damage, if not prevented, would have been greatly minimized.

Moreover, the plaintiff had left a large pile of dirt in the bed of the river next to the river wall of the lock which it should have removed. This dirt obstructed the flow of the river and, therefore, increased the velocity of it toward the cofferdam across the river.

The scouring was caused by an act of nature, for which, of course, the defendant was in no way responsible, and which could have been prevented had the plaintiff done three things which it was required to do: (1) had it bermed the cells of the cofferdam, as required; (2) had it removed the pile of dirt from the river as it was required to do and had been ordered to do; and (3) had it protected the bank of the river below the land wall of the lock so the gates could have been opened.

The plaintiff is not entitled to recover on this claim.

CLAIM NO. 6.—ADDITIONAL PAYMENT FOR FLOODING OF THE COFFERDAM DURING PERIOD FROM MARCH 25, 1936, TO APRIL 16, 1936

On this claim plaintiff sues for $2.500 on the ground that between March 25, 1936, and April 16, 1936, there were two floods, when the stage of the river reached 115 feet and that, therefore, under the specifications it is entitled to two payments of $2,500 each. The specifications provide for a payment of $2,500 whenever the river reaches an elevation of 115 feet. The stages of the river during these dates are set out in the findings. They show that on March 25, 1936 the river reached a stage of 115 feet and continued at this height or above until 11:00 a. m. on March 31, 1936, when it receded to 114 feet, at which time plaintiff resumed operations. Operations were continued until 11:00 p. m. on April 1, 1936, when the work was stopped on account of another rise in the river. On April 2, 1936, the stage again reached 115 feet, and continued at this stage or above until April 16, 1936.

Paragraph 1–06 of the specifications provides for a payment of $2,500 for a stoppage in the work on account of a flood, to be paid " upon full resumption of the work on the lock and/or dam." We are of opinion that plaintiff is entitled to only one payment of $2,500, which has been paid, for the high water existing between March 25, 1936 and April 16, 1936, by reason of the provision that this amount is to be paid "upon full resumption of the work on the lock and/or dam." While on March 31, 1936, plaintiff had resumed some of the work on the dam, it had not resumed all of the work. The proof shows that it had begun pumping the water out of the cofferdam, and by the time of the second flood had reduced the level of it from 113 feet to 90.9 feet. It also had resumed installation of the pump sumps, but it had not resumed operations with the dragline. When work was stopped again, it was in the process of cleaning and repairing this dragline, but had not yet gotten it in condition to resume operations with it. Since the specifications provided for the payment of $2,500 "upon full resumption of the work," and since the work was not fully resumed on March 31, and not until April 16, plaintiff is entitled to recover only one payment of $2,500.

It is true that the second rise deprived plaintiff of the advantage of the 22 feet of water which had been pumped from the cofferdam in the interim, and of the work it had done in cleaning and otherwise reconditioning the dragline, but there is no provision of the specifications providing for payment therefor. In the absence of a provision providing for such payment, it must be held that this was one of the risks assumed by the plaintiff in the doing of the work.

The amount of $2,500 having already been paid plaintiff on account of the high waters from March 25, 1936 to April 16, 1936, it is not entitled to recover anything more on this claim.

CLAIM NO. 7.—ADDITIONAL COST OF PERMANENT SHEET STEEL PILING CUT-OFF WALL UNDER DAM

On this claim the plaintiff sues for $1,455.90, the cost to it of using piling 34 feet long, instead of 17 feet long,

in constructing the cut-off wall between the cofferdams for the first and second sections of the dam. The necessity for the use of the longer piling was the scouring of the river, discussed under claim 5. For this scouring we have held the defendant was not responsible.

Besides, article 5 of the contract provides:

> Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

The extra length piling was not ordered in writing by the contracting officer. Plaintiff installed it on its own initiative, without claiming any extra compensation for it at the time, and not until the conclusion of the work, when it wrote the contracting officer its letter of May 28, 1937 setting out its various claims for additional compensation. This claim was denied by the Chief of Engineers, and his action is plainly correct.

CLAIM NO. 8.—FLOOD DAMAGE TO SECOND COFFERDAM FOR THE DAM

Plaintiff sues for $5,477.30 for the cost of reconstructing cell B in the cofferdam for the second section of the dam. The proof shows that during a certain rise in the river the elevation of the water outside of the cofferdam was increased to 25 feet above that in the dam. This caused cell B to collapse. There is no showing that the defendant was in anywise responsible therefor.

Plaintiff contends that the defendant should have provided for a belt of riprap upstream from the concrete structure to prevent the water from sucking out the material underneath the cofferdam. Whether or not this is so, the plaintiff entered upon and continued the work knowing that no such riprap had been constructed, and it made no protest against it.

Moreover, plaintiff reconstructed the cell on its own initiative and without making any claim for extra compensation at the time, and without furnishing the defendant with the costs thereof while it was being reconstructed, as it was required to do. Its first claim on this account was asserted

after its work had been completed, in its letter of May 28, 1937, heretofore referred to.

The plaintiff is not entitled to recover on this claim.

CLAIM NO. 9.—COST OF ADDITIONAL CEMENT USED IN CONCRETE

The plaintiff sues to recover the value of the cement it was required to incorporate in the concrete which was in excess of that specified by the specifications. The specifications provided for 4.5 bags of cement to each cubic yard of concrete. From June 24, 1935 to August 8, 1935 plaintiff was required to put 4.7 bags of cement in every cubic yard of concrete, instead of 4.5 bags as specified, and thereafter it was required to put 5 bags of cement in every cubic yard of concrete.

Paragraph 5–13 (b) of the specifications provides:

> The exact proportions of all materials entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all materials entering into the concrete. The proportions will be changed whenver in the opinion of the contracting officer such change becomes necessary to obtain the specified strength and the desired density, uniformity and workability, and the contractor will not be compensated because of such changes.

Acting under the authority thereby conferred, the contracting officer first required the plaintiff to use 4.7 bags of cement per cubic yard, instead of 4.5 bags. This was necessitated, in his judgment, by the character of the coarse aggregate used by the plaintiff in the mix.

The plaintiff continued to use this amount of concrete from June 24, 1935 to August 8, 1935. On the latter date the contracting officer made an inspection of the work and found that a portion of the face of one of the monoliths was honeycombed and, therefore, determined that it would be necessary to use 5 bags of cement in order to get proper workability of the concrete. When the plaintiff protested against such verbal instruction, the contracting officer wrote it the next day directing it in writing to use 5 bags of cement per cubic yard, unless the plaintiff corrected the condition by doing one of two other things: either by using "more

suitably graded aggregates, or by the addition of pozzuolanic material." The plaintiff preferred to adopt neither of these alternatives, and continued to use 5 bags of cement in every cubic yard of concrete. It did this without making further protest and without taking an appeal to the head of the department, as provided for in the contract.

Authority was plainly conferred on the contracting officer to prescribe the ingredients for the concrete, and his action in prescribing 5 bags of cement does not appear to be unreasonable. On the contrary, it would appear that he undertook to be as fair as possible with the plaintiff by giving it the option either of using more suitably graded aggregates, or by adding pozzuolanic material to the mix. Plaintiff did not choose to do either one, but apparently preferred to use the additional amount of cement required.

In addition, plaintiff failed to take an appeal to the head of the department within the time required, as required by the contract, and for this additional reason it is not entitled to recover.

CLAIM NO. 10.—ADDITIONAL COST IN MAKING FILL UPSTREAM FROM DAM

Plaintiff sues for the sum of $445.79, the excess of the cost of the partial construction of a berm on the upstream edge of the dam above the amount paid it.

The construction of this dam was provided for by change order No. 20, paragraph (a) of which is quoted in finding 80.

The plaintiff was paid for the amount of material deposited. This is not disputed by the plaintiff; its claim is grounded on the fact that since a portion of the material which it placed in the berm was washed away by the current, and since it was paid only for that part which remained in place, it is entitled to recover under paragraph 1–12 of the specifications, instead of under the provision of the change order.

Paragraph 1–12 of the specifications plainly has no application. This relates only to such extra work as is not covered by articles 3 and 4 of the contract. This work was covered by article 3 of the contract. The change was ordered in writing by the contracting officer as provided for in this

article. Plaintiff has been paid on the basis of the agreement contained in change order No. 20 and is not entitled to additional compensation, notwithstanding the fact that the work cost it more than it has been paid.

CLAIM NO. 11.—ADDITIONAL COST OF REHANDLING RIPRAP STONE UNDER CHANGE ORDER NO. 20

This claim is for the extra cost of handling twice the stone necessary to sink and anchor the mattress upon which the plaintiff was required by change order No. 20 to place riprap. It appears that the plaintiff was directed by the resident engineer to have available 8 carloads of stone not later than December 28, 1936 for the purpose of sinking and anchoring this mattress. No stone arrived until December 31, 1936, when the plaintiff received 6 carloads. The defendant had a force of men available on that date to sink the mattress, but it was not requested so to do by the plaintiff. The New Year's holiday began on noon of that date, and extended through January 3, 1937, during which time no work was performed, nor was any requested of the defendant by the plaintiff. In the meantime a rise in the river prevented the work's being done, and it was not done until January 15, 1937. This made it necessary for the plaintiff to unload the stone from the cars onto the ground, and then later load it onto the barges. For this extra work for twice handling the stone it makes this claim.

It is plain that it is not entitled to recover. In the first place, the plaintiff did not deliver the stone at the time required. When it did deliver it, an oncoming holiday interfered with the immediate placing of the stone on the mattress. A rise in the river occurred in the meantime, necessitating the handling of the stone twice. The necessity for so doing clearly was not the fault of the defendant, and plaintiff, therefore, is not entitled to recover.

CLAIM NO. 12.—ADDITIONAL COST OF REPAVING ESPLANADE OF LOCK

The plaintiff asserts claim for the sum of $537.22, the cost of removing and replacing a portion of the esplanade between the land wall of the lock and the natural bank of

the river, which had been damaged by a settling of the earth in the fill which had been constructed by the plaintiff.

Plaintiff is not entitled to recover. The fill had been constructed by the hydraulic process, leaving the top of it uneven. It was smoothed off by a dragline. Before the concrete could be placed, all of the material, including that disturbed by the dragline, had to thoroughly settle. Plaintiff's project manager and the resident engineer agreed that it should be settled by running water thereon from a hose until such time as the resident engineer should determine it had thoroughly settled. Before he had given his approval therefor, the plaintiff began the paving, although the resident engineer advised it that this could be done only on its own responsibility. The plaintiff assumed the risk of the fill's settling. It did settle, as a result of which the paving was damaged. Plaintiff, therefore, is not entitled to recover on this claim.

On the whole case the plaintiff is entitled to recover from the defendant the sum of $1,726.18. It is so ordered.

MADDEN, *Judge*; JONES, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

J. W. EARNSHAW v. THE UNITED STATES

[No. 41867. Decided April 6, 1942]

On the Proofs

Pay and allowances; rental allowance where inadequate quarters were furnished officer in the Marine Corps.—Where lieutenant in the United States Marine Corps, on duty in Shanghai, China, was assigned to an unsuitable attic room, which he vacated after two days and thereupon rented suitable quarters at his own expense; it is *held* that he is entitled to recover for the full rental allowance for the period involved.

The Reporter's statement of the case:

Mr. John W. Price for the plaintiff. *Mr. Rees B. Gillespie* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. From July 16, 1929, to September 12, 1929, plaintiff was a second lieutenant, United States Marine Corps, without dependents, and served with the Marine Corps Expeditionary Forces in China. During this period plaintiff was not assigned quarters.

2. During the first five days of plaintiff's service in China he occupied with another officer a room in the Officers' Club in Shanghai, China. When this other officer left, the room was given to a third officer who had previously asked for it. Plaintiff then moved out and occupied a smaller room in the attic of the building. At the end of two days, because he considered the room too hot and uncomfortable, plaintiff voluntarily vacated this room, and rented, at his own expense, an apartment in which he lived during the remainder of the period in question. Plaintiff paid for this apartment the monthly rental of approximately $55.

The building referred to above, in which plaintiff spent 7 days, before moving to outside quarters, was one leased by the United States for the use of officers on duty in Shanghai.

3. During the period of his detail in China plaintiff operated against no enemy actual or potential.

4. Plaintiff was not granted any permanent quarters nor did he at any time receive any adequate and proper quarters.

5. Full rental allowances for the period from July 16, 1929, to September 12, 1929, would be $76.00.

The court decided that the plaintiff was entitled to recover.

Green, *Judge*, delivered the opinion of the court:

The plaintiff was at the time involved a second lieutenant in the United States Marine Corps serving in China and without dependents. The force to which he was attached was not operating against any enemy.

For five days he occupied a room with another officer at the Officers' Club in Shanghai, China, but, this room being given to another officer, plaintiff moved out and took a smaller room in the attic of the building. At the end of two days because he considered the attic room too hot and uncomfortable, he voluntarily vacated this room and rented,

at his own expense, an apartment in which he lived for the remainder of the period involved. He claims full rental allowance for all of this time.

The case is on the border line by reason of the lack of definite evidence but on the whole we think it does not appear that the room which the plaintiff was finally allowed to occupy could be called quarters in any proper sense. It was an attic room in a city which the court will take judicial notice is located in a region having a warm climate. The plaintiff considered the room too hot and uncomfortable for habitation. We think that the fact that he voluntarily gave up the room on that account and paid a substantial sum for other quarters is some evidence that the room in the Officers' Club which he last occupied could not properly be called quarters within the statutory meaning.

The plaintiff was not actually assigned quarters and in some of our former decisions we have held that where the officer did not incur any expense by reason of the failure to assign him quarters, this fact may be considered in denying him relief. But here the officer did, in fact, incur expense and we think we can infer he would not have done so if the room he last occupied was reasonably suited for quarters.

The plaintiff was entitled to two rooms. He received one for a few days in company with another officer. This was not adequate and proper quarters in any sense and we do not think any charge should be entered against him by reason thereof. The occupation of the attic room only resulted in his being required to move again and for practical purposes he was in a position of an officer who had received no quarters at all.

It follows that plaintiff is entitled to recover the full rental allowance for the period involved which is seventy-six dollars ($76.00) and judgment in his favor will be rendered accordingly.

It is so ordered.

Madden, *Judge;* Jones, *Judge;* Whitaker, *Judge;* and Littleton, *Judge;* concur.

Syllabus

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OSKAR J. ENGMAN v. THE UNITED STATES

No. 43383

[Decided April 6, 1942]

On the Proofs

Detention of foreign owned vessels in wartime; refusal of clearance.—Decided upon the authority of *J. A. Zachariassen & Co.* v. *United States*, 94 C. Cls. 315.

Mr. John G. Poore for the plaintiffs. *Mr. James C. Webster* and *Mr. John Walsh* were on the brief.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion *per curiam*, as follows:

The facts set forth in findings 1, 2, 7, 8, 11, 12, 13, 14, 15, and 16 in the case of *J. A. Zachariassen & Co.* v. *United States*, 94 C. Cls. 315, obtain and are applicable to each of the above-styled cases, and are adopted by the court as its findings in these cases. Each of the vessels involved in the present cases was detained by the United States for a certain period of time between March 18, 1918, and November 26, 1918. The court finds that such detentions were not unlawful, and for the reasons set forth in the opinion in the case of *Zachariassen & Co.* v. *United States*, *supra*, it is decided that plaintiffs are not entitled to recover. The petitions are therefore dismissed, and judgment is rendered against plaintiffs for the cost of printing the records herein, the amount thereof to be entered by the clerk and collected by him according to law. It is so ordered.

PETER J. GALANTE v. THE UNITED STATES

[No. 43804. Decided April 6, 1942]

On the Proofs

Pay and allowances; officer in Medical Reserve, U. S. A., with dependent mother.—Decided upon the authority of *Tomlinson v. United States*, 66 C. Cls. 697, and similar cases cited.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was appointed First Lieutenant, Medical Corps Reserve, February 21, 1935, and served on active duty with

the Civilian Conservation Corps from March 25, 1935, to March 3, 1937. He claims statutory increased rental and subsistence allowances for an officer of his rank having a dependent mother for the period March 25, 1935, to March 3, 1937.

2. Plaintiff's father, John P. Galante, who was 59 years of age on November 15, 1938, was employed as a bricklayer until 1932, when, because of foot trouble, he was forced to discontinue that line of work. In 1933 or 1934 he started in business as a contractor but had to discontinue after a short time on account of insufficient capital. He has worked part of the time since 1934 as a real estate agent, earning not more than $200 for one year. October 15, 1936, he again attempted bricklaying, and on that day, while holding the rope of a scaffold, one end of the scaffold fell, further injuring his feet. He received disability compensation therefor of $10 a week until about October 1938. Plaintiff's father had no physical disability except for the fact that he was unable, without suffering severe pain in his feet, to stand more than three or four hours a day.

3. Plaintiff's father and mother, Mrs. Mary Galante, and two of their children, Benjamin and Frances, lived together in Brooklyn, New York, during the period of this claim. Plaintiff's mother was forced to discontinue her work as a dressmaker in 1934 on account of failing eyesight and health.

4. Benjamin, 30 years of age and unmarried, served as an enlisted man in the United States Navy until 1933. He was unemployed from that time until January 7, 1936, when he was appointed as a guard on the New York Stock Exchange at $25 a week, and since then has contributed $30 a month to his parents for room and board.

Frances, 28 years of age, plaintiff's unmarried sister, was intermittently employed as a dressmaker during the period of this claim. Her average income was about $10 a week, all of which she turned over to her parents, who bought her clothes and furnished her with carfare and lunch money. The daughter's earnings, after such deductions, do no more than pay her pro rata share of the household expenses.

5. The monthly living expenses of plaintiff's parents, averaging $130 or $136 a month, were as follows: $50 for rent; $60 to $65 for food; $9 for coal; $8 or $9 for gas and

electricity, and about $3.55 a month for telephone service during part of the period involved. The mother's pro rata share of these expenses was about $33 a month. Her expenditure for clothes amounted to about $5 a month, incidentals $5, and her dental bill during 1936 was $10 a month, her total average monthly expenses during the period of this claim being about $53.

6. Neither of plaintiff's parents owned any real or income-producing personal property during the period involved in this suit.

7. Plaintiff contributed $100 or more a month to his parents from March 25, 1935, to March 3, 1937. These contributions were made by check drawn in favor of his father and were used by him for the support of himself and wife. Since March 3, 1937, plaintiff has contributed about $80 a month to their support.

8. The records of the General Accounting Office show that plaintiff was credited with rental allowance from April 18 to June 30, 1935, at $40 per month, but that he received no rental allowance from March 25 to 31, 1935, nor from July 1, 1935, to March 3, 1937.

9. Increased rental and subsistence allowances for an officer of plaintiff's rank on account of a dependent mother, for the period from March 25, 1935, to March 3, 1937, amount to $1,725.86.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case are not in dispute. They show plainly that plaintiff's mother was in fact dependent upon him for her chief support. Claim is based on section 4 of the act of June 10, 1922, 42 Stat. 625,628, and, under the many uniform decisions of this court, plaintiff is entitled to recover increased rental and subsistence allowances from March 25, 1935 to March 3, 1937. *Tomlinson* v. *United States*, 66 C. Cls. 697; *Samouce* v. *United States*, 69 C. Cls. 65; and *Culver* v. *United States*, 81 C. Cls. 631.

Plaintiff is entitled to recover $1,725.86. It is so ordered.

JOHN A. MARSH v. THE UNITED STATES

[No. 45034. Decided April 6, 1942]

On the Proofs

Pay and allowances; date of retirement of Navy officer.—Decided upon the authority of *James A. Greenwald* v. *United States*, 88 C. Cls. 264, and similar cases cited, in which it was held that an officer is retired as of the date fixed in the President's order.

The Reporter's statement of the case:

Mr. Fred W. Shields for plaintiff. *King & King* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. December 18, 1918, plaintiff enlisted in the United States Navy. He was appointed midshipman July 23, 1920; commissioned ensign June 5, 1924, lieutenant (junior grade) June 5, 1927, and lieutenant June 1, 1933. He served continuously on active duty as a commissioned officer from June 5, 1924, to August 1, 1936, when he was transferred to the retired list.

2. Pursuant to orders issued by the Secretary of the Navy March 5, 1936, plaintiff appeared before a Naval Retiring Board, which determined that he was incapacitated for active service by reason of tuberculosis, and that his incapacity was permanent and the result of an incident of the service.

3. The proceedings and findings of the Naval Retiring Board were forwarded to the Secretary of the Navy, who transmitted them to the President May 26, 1936, with the recommendation that they be approved and that plaintiff be retired from active service on August 1, 1936, and placed on the retired list in conformity with the provisions of the United States Code, Title 34, Section 417. May 27, 1936, the President approved the findings of the Naval Retiring Board and the recommendation of the Secretary of the Navy.

4. June 8, 1936, the Chief of the Bureau of Navigation advised plaintiff as follows:

> 1. The Naval Retiring Board before which you appeared found you incapacitated for active service by reason of tuberculosis, pulmonary, chronic, active, moderately advanced; that your incapacity is permanent, and is the result of an incident of the service.
>
> 2. The President of the United States, under date of 27 May, 1936, approved the proceedings and findings of the Naval Retiring Board in your case, and on 1 August, 1936, you will, in accordance with his direction, regard yourself as having been transferred to the retired list of officers of the Navy from that date, in conformity with the provisions of U. S. Code, Title 34, Section 417.
>
> 3. The Bureau regrets that your disability has interrupted your career of active service.
>
> 4. Acknowledgment of receipt is requested.

5. Plaintiff completed 12 years' service for pay purposes June 4, 1936. He claims active duty pay for an officer of his rank with more than 12 but less than 15 years' service from June 5 to July 31, 1936, and retired pay on that basis from August 1, 1936. This claimed increase was withheld by the Comptroller General on the ground that plaintiff's retirement became effective May 27, 1936, the date on which the President approved the findings of the Naval Retiring Board and the recommendation of the Secretary of the Navy, and not on August 1, 1936, when, under the President's order, his retirement became effective.

6. There is due plaintiff for the period June 5, 1936, to July 31, 1936, inclusive, the difference between $240.00 per month, the active duty pay of a lieutenant, United States Navy, with over 12 but less than 15 years' service, and $230.00 per month, the pay of an officer of that rank with less than 12 years' service. Computed at $10.00 a month for 1 month and 26 days, the claim amounts to $18.67.

Plaintiff is entitled to retired pay based on all service performed by him prior to August 1, 1936, that is, the difference between $180.00 per month, the retired pay of a lieutenant, United States Navy, retired after 12 but less than 15 years' service, and $172.50, the amount received by him as a retired officer of that rank, with less than 12 years' service. From

August 1, 1936, to March 31, 1940 (the date of the latest available pay roll on file in the General Accounting Office at the time of the hearing), a period of three years and eight months at $7.50 a month, the claim amounts to $330.00. This is a continuing claim.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The sole issue raised in this case has been decided by this court in the cases of *James A. Greenwald* v. *United States*, 88 C. Cls. 264; *Charles G. Wadbrook* v. *United States*, 90 C. Cls. 48; *Henry M. Butler* v. *United States*, 91 C. Cls. 88; and *Warner U. Hines* v. *United States*, decided December 1, 1941 (95 C. Cls. 156). Upon the decisions in those cases, plaintiff is entitled to recover. The claim, however, is a continuing one, and entry of judgment will be suspended pending receipt of a report from the General Accounting Office, showing the amount due plaintiff in accordance with this opinion.

It is so ordered.

In accordance with the above decision and upon a report from the General Accounting Office showing amount due thereunder, the court on November 2, 1942, entered judgment for the plaintiff in the sum of $372.92.

DAMERON & KENYON, INC., A CORPORATION, v. THE UNITED STATES

[No. 45163. Decided April 6, 1942]

On the Proofs

Government contract; effect of Supreme Court decision declaring unconstitutional Title I of National Industrial Recovery Administration Act.—Where plaintiff, a contractor, on May 31, 1935, in response to defendant's invitation for bids, submitted its bid for the construction of Bayou Fordoche-Lottie Levee on the Mississippi River; and where said bid, dated May 20, 1935, contained the required clause stating that the bidder was complying with, and would continue to comply with, each approved Code of Fair Competition to which it was subject under the National Industrial Recovery Administration Act and the President's Agreement as to hours and wages; and where the bid price was not inserted in plaintiff's bid until May 30, 1935; and where Title I of the National Industrial

Recovery Administration Act, providing for said Codes of Fair Competition, was declared unconstitutional by the Supreme Court on May 27, 1935 (*Schechter Poultry Corporation* v. *United States*, 295 U. S. 495); and where plaintiff did not comply with the minimum wage and maximum hour provisions of such code applicable to its industry; it is *held* that plaintiff was not bound by the contract to pay any specific minimum wage and is accordingly entitled to recover its excess costs for the performance of the contract resulting from the enforced compliance with said requirements of the code.

Same.—When the *Schechter* case was decided, the Codes of Fair Competition became legally ineffective.

Same.—In the instant case, it is *held* that the evidence submitted is adequate to determine the difference between the wages in fact paid by the plaintiff and the prevailing wages which would have been paid by the plaintiff without coercion by the defendant.

The Reporter's statement of the case:

Mr. Morris B. Redmann for the plaintiff. *Schwarz, Guste, Barnett & Redmann* were on the brief.

Mr. Robert E. Mitchell, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation of the State of Louisiana, with its principal place of business at Port Allen, Louisiana, and is engaged in the business of building levees. Plaintiff has always been the sole owner of the claim herein asserted.

2. Under date of June 17, 1935, plaintiff entered into a written contract (No. W1096–eng.–4011) with defendant, represented by J. N. Hodges, Lieutenant Colonel, Corps of Engineers, U. S. Army, who was the district engineer at New Orleans, Louisiana, whereby plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of approximately 2,600,000 cubic yards, of the Bayou Fordoche-Lottie Levee, items E 12–A, E 12–B, and E 12–C, East Atchafalaya Basin Protective Levee, Point Coupee Parish, Louisiana, for the consideration of ten and twenty one-hundredths (10.20) cents per cubic yard, place measurement, and in accordance with the designated specifications, schedules, and drawings.

The specifications contained the following provisions:

5 (b). The contractor shall comply fully with the Labor and Sanitary Regulations prescribed by the Chief of Engineers as specifically set forth in pamphlet hereto attached and designated "Labor and Sanitary Regulations Flood Control, Mississippi River and Tributaries," except as same may conflict with requirements of Code of Construction Industry, or National Industrial Recovery Act (whichever one is applicable to the work herein described) or with rulings thereunder or with modifications thereof.

36. *Code Compliance.*—The contractor agrees that he will comply with each approved Code of Fair Competition to which he is subject and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then, as to such trade or industry, with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.

The United States shall have the right to cancel this contract for failure to comply with this provision, and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor.

3. The contract resulted from a notice to prospective bidders issued May 11, 1935, by the district engineer at New Orleans and the acceptance of plaintiff's bid, which bid was dated May 20, 1935, and was delivered to the district engineer's office on May 31, 1935, the day specified for the opening of bids. As required by the invitation to bid, the bid of plaintiff contained the following statement:

It is hereby certified that the undersigned is complying with, and will continue to comply with, each approved Code of Fair Competition to which it is subject, and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then, as to such trade or industry it has become a party to and is complying with, and will continue to comply with, an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.

The bid submitted by Cralan, Inc., one of the unsuccessful bidders, was accompanied by a letter which contained the following statement:

If the Code of Fair Competition does not apply to this contract, one and one-half cents per cubic yard may be deducted from our bid, making our bid for

Items E-12, A, B, and C, comprising approximately 2,600,000 cubic yards, per cubic yard in cents 12.39, total in dollars $322,140.00.

The bid submitted by H. B. Blanks, another unsuccessful bidder, contained the following statement written across its face:

> Bid submitted under Code scale of wages, if not enforced reduce price $5,820.00.

4. Plaintiff's bid was accepted and on June 17, 1935, it signed three copies of the contract which had been sent to it by the defendant for that purpose, and returned them to the defendant for signing.

5. On June 28, 1935, the district engineer gave plaintiff written notice to commence work under the contract within 20 calendar days and forwarded to plaintiff an executed copy of the contract. Attached thereto was a typewritten substitution for paragraph 36 of the specifications which substitution had not accompanied the contract at the time plaintiff signed it. This document dealt with maximum hours of labor, minimum rates of pay, and the payment of wages. So far as material here, it contained the following provisions:

> No employee shall be paid less than the rate of 40 cents per hour which must not be construed as establishing a minimum rate of pay for other than common or unskilled labor * * *; and provided further that such provisions shall not be construed to authorize reductions in existing rates; and provided further that no employee shall be permitted to work in excess of forty (40) hours per week or in excess of eight (8) hours in any one calendar day * * *.

Plaintiff did not notice the attachment of this paper to the contract until about July 2, 1935, when it returned the contract to the district engineer's office, at the request of his representative, and the substitution was removed by the representative. Paragraph 36 of the specifications accompanying the contract at the time of its execution by plaintiff, the provisions of which are set forth in Finding 2, was not removed and continued as a physical part of the contract.

6. On May 27, 1935, the Supreme Court of the United States had rendered its decision in the case of *Schechter*

Poultry Corp. v. *The United States*, 295 U. S. 495, and plaintiff as a result of that decision, believed that it would not be required to comply with the provisions of paragraph 36 of the specifications. The bid price was not inserted in plaintiff's bid until May 30, 1935, and was based on hours and wages prevailing at the site without regard to any Code of Fair Competition.

Plaintiff began work at the site June 24, 1935, and from that date until August 5, 1935, plaintiff paid its employees without regard to the scale of minimum wages or maximum hours of labor as prescribed in the Code of Fair Competition under the National Industrial Recovery Act, without advising or consulting with defendant's representatives, or making any protest or objection with respect to the provisions of the Code.

7. On July 9, 1935, plaintiff addressed a letter to Lieut. Col. J. N. Hodges, District Engineer, United States Engineer Office, New Orleans, Louisiana, as follows:

> We are informed by our legal adviser that the portion of our contract for the construction of the Lottie-Fordoche Levee dealing with the compliance with the Code of Fair Competition, has been invalidated by the recent decision of the U. S. Supreme Court and that we are, therefore, not bound by the terms of Paragraph 36 of the contract specifications covering said work.
>
> Accordingly, we are making some changes in the hours of labor and wages of same, on the above-named contract, which are not in accord with the Code requirements.
>
> In regard to the above this is not to be construed as meaning that we are attempting to save money by reducing the wages of our employees as our gross pay rolls will probably equal or exceed those under the Code requirements, as many of our men will have raised wages far above the Code scale.
>
> It is our desire and intention to comply strictly with all terms and conditions of our contract and we ask that you kindly advise us as soon as possible if our action in this matter constitutes an illegal violation of our contract. If so, the matter will immediately be adjusted to your entire satisfaction.

8. On or about August 1, 1935, the principal engineer, United States Engineer Office, Second New Orleans District, orally advised plaintiff that neither the first estimate

(covering work performed during the last week of June, and during the month of July 1935), nor any subsequent estimate would be paid unless plaintiff adhered to the scale of maximum hours of labor and minimum wages provided in the Code of Fair Competition for the Construction Industry, General Contractors' Division. Plaintiff orally advised the principal engineer that it was unable to finance performance of the contract without the prompt payment of current estimates, and therefore was forced to comply with the department's demand, which it would do, but under protest.

9. On August 5, 1935, the contracting officer replied to plaintiff's letter of July 9, 1935, as follows:

> I have your letter dated July 9, 1935, in which you informed me that pursuant to advice of your attorneys you are changing the hours and wages of labor of construction of Bayou Fordoche-Lottie Levee under contract No. W1096 eng.-4011. It is noted that your decision to revise the hours of labor upward and to lower wages on this work is based on a decision by the United States Supreme Court, which decision, rendered on May 27, 1935, held that Codes of Fair Competition were not enforceable and that therefore, inasmuch as you could not be compelled to comply with your adopted code by any authorized agency, any provision in the contract relative to code compliance was and is null and void. However, the nullification of Codes of Fair Competition by the Supreme Court does not extend to you the right to change any of the terms of contract.
>
> Under the terms of Paragraph 36 of the contract specifications you agreed to conform to certain mutually understood stipulations relative to hours of labor and rates of pay. These hours and rates were definitely set out and described in a document known to all parties concerned as the approved "Code of Fair Competition," and were to remain in full force and effect during the entire life of the contract in the same manner as if definite hours of work and rates of pay had been separately stated in the body of the contract covering all positions of labor required on the job. The mere fact that hours of labor and rates of pay were not specifically and separately set out in the contract does not alter the situation, inasmuch as the agreement between yourselves and the United States was based on

an understanding with which both parties were fully cognizant, this understanding being that the hours of labor and rates of pay were fully set out in your code and referred to as such in the contract and specifications.

The United States in preparing its own estimate of the cost of the work assumed the hours of labor and rates of pay stipulated in Paragraph 36 of the contract specifications, as did all other parties who submitted bids for performance of the work. If changes are now permitted, the United States and all unsuccessful bidders must be given equal opportunity to revise their estimates, based on whatever hours of labor and rates of pay each of them may assume as being possible. If such an opportunity were provided all bidders it is certain that the resultant bid-price would be considerably less than that which the United States is now paying to you under your contract based on limited hours and minimum rates. Therefore, were you permitted to scale down rates of pay and increase hours of labor, the United States would be placed in the position of paying more than the prevailing rates for services rendered, which action could not be countenanced by either the Comptroller General or by the United States Courts.

I have to advise you, therefore, that no increase in hours of labor nor any reduction in the rates of pay described in Paragraph 36 of the contract specifications is authorized.

10. The contracting officer also advised plaintiff, subsequently, upon receipt of inquiry, that it had 30 days, under Article 15 of the contract, within which to appeal his decision. Plaintiff, within due time, sent its appeal, through the district engineer, to the Chief of Engineers, and not receiving a prompt reply, on October 15, 1935, telegraphed the Chief of Engineers for his ruling. The Chief of Engineers on October 30, 1935, wired plaintiff as follows:

* * * Compliance with various code provisions pursuant to National Industrial Recovery Act when required by terms of existing contracts is a matter of contract obligation for enforcement by the contracting officer the same as any other provision contained therein and this department is without authority to waive such requirement Stop Your request therefore cannot be granted.

11. Beginning in October 1935, plaintiff signed all vouchers covering work performed "under protest as to Code compliance."

Plaintiff, also, by letter of June 30, 1936, presented its contention to the Comptroller General who replied that the questions presented did not require nor authorize a decision from him.

12. On December 10, 1936, plaintiff forwarded to the district engineer a statement of the amount of its claim resulting from compliance with the Code, from August 1935 to December 1, 1936. In reply plaintiff was advised by the district engineer that the claim would be administratively examined by the contracting officer after completion of the contract, and forwarded to the General Accounting Office for consideration. Again on March 3, 1937, May 2, 1937, and July 31, 1937, plaintiff submitted to the "Claims Division, General Accounting Office, through the District Engineer," additional statements of the claim as increased by work performed subsequently to December 31, 1936, and by letter of September 3, 1937, it submitted its official corrected statement in a total sum of $40,070.87.

13. Performance of the contract was completed by plaintiff on July 27, 1937, within the contract time as extended to July 31, 1937, by three change orders issued thereunder.

14. On September 14, 1937, plaintiff forwarded its claim to the Chief of Engineers, through the district engineer, who by endorsement of September 23, 1937, recommended its denial to the Chief of Engineers. On February 8, 1938, the Chief of Engineers submitted the claim to the General Accounting Office with his report and recommendation that it be denied, and by decision of June 7, 1938, the Claims Division, General Accounting Office, disallowed the claim in its entirety. Upon review requested by plaintiff, the disallowance was sustained by the Comptroller General on May 31, 1939.

15. The Code of Fair Competition for the Construction Industry was approved by the President on January 31, 1934. Upon receipt of the contracting officer's letter of August 5, 1935, quoted in finding 9, plaintiff complied, under protest,

with the following provisions of that code in the performance of its contract:

Sec. 2. Where no applicable mutual agreement as provided in Section 1 of this article shall have been approved, employers shall comply with the following provisions as to minimum rates of pay and maximum hours of labor.

A. No employee, excluding office and clerical employees, shall be paid at less than the rate of 40 cents per hour, provided, however, that the provisions of this paragraph A shall not be construed as establishing a minimum rate of pay for other than common or unskilled labor; and provided further that such provisions shall not be construed to authorize reductions in existing rates of pay.

* * * * *

B. No employee shall be permitted to work in excess of forty (40) hours per week or in excess of eight (8) hours in any twenty-four (24) hour period, * * *.

For several years preceding the making of the contract here in suit nearly all of plaintiff's work had been for the United States Government, and just prior to commencing work on the contract in suit it had completed for defendant a job on the Palmetto-Courtableau Levee, in the West Atchafalaya Basin, under specifications which contained the code compliance provision. In the performance of that work plaintiff complied with the requirements of the Construction Industry Code for a minimum wage of 40 cents an hour, and maximum hours of 40 per week. At the time of receiving the invitation to bid on the contract in suit, plaintiff understood that the code compliance provision, as it related to the proposed work, had reference to compliance with the Construction Industry Code.

There is no evidence of any change in the wage and hour provisions of the Construction Industry Code subsequent to its approval by the President.

16. Article 11 (a) of the contract prohibits the employment of any laborer or mechanic for more than 8 hours in any one calendar day, providing a penalty of $5 for each violation thereof. This provision is, however, made subject to the exceptions stated in the Act of June 19, 1912 (37

Stat. 137), which expressly excepts from its terms "the construction and repair of levees or revetments," such as the work here involved.

Paragraph 5 (a) of the specifications prohibited the performance of work on Sundays or holidays except with the consent of the contracting officer. This consent is customarily requested and granted on levee construction work, and it was granted to plaintiff in this case. Performance of the Bayou Fordoche-Lottie Levee work under the contract here in suit was carried on 24 hours a day, every day.

17. The amount of plaintiff's claim, as set forth in its petition is $40,070.87, and is divided into two parts:

1. Excess cost due to compliance with the code	$34, 915. 74
2. Loss of efficiency due to working 4 shifts instead of 3 per calendar day, because of the limitation of hours	5, 155. 13
	40, 070. 87

Item No. 2, above, loss of efficiency, has been abandoned by plaintiff.

In auditing plaintiff's claim some clerical errors in computation were found by defendant's auditors, which with the abandonment of item 2, leaves the claim as adjusted -------- $34,967.39

as shown by defendant's exhibit D, which is made a part of this finding by reference.

A deduction is made in connection with the claim for common labor. Defendant's exhibit D shows for common labor 70,652 hours, but plaintiff withdraws from its claim 1,170 hours, amounting to $144.42, because they occurred during the period June 24 to August 5, 1935, which was prior to the application of the minimum Code rate of 40 cents per hour. Plaintiff actually paid wages of 25 cents, 27½ cents, and 30 cents per hour for those 1,170 hours.

18. Plaintiff admits the mathematical accuracy of the audit (defendant's exhibit D) but contends that as a result of the *Schechter case* it was not required to pay the minimum Code wage of 40 cents, but that the prevailing wage rate, as

shown by defendant's exhibit C, made part of this finding by reference, should apply.

19. Plaintiff claims it was compelled to employ an extra operator and an extra engineman under the Code maximum hours requirement.

Plaintiff paid 3 operators in July (before compliance with Code requirements) $175 each per month, or $525. Under Code requirements plaintiff paid 4 operators $150 each per month, or $600, the excess cost being $75 per month, making a total for the 22 months of $1,650 on this account.

Plaintiff paid 3 enginemen in July (before compliance with Code requirements) $90 per month each, or $270. Under Code requirements plaintiff paid 4 enginemen $75 per month, or $300, the excess cost being $30 per month, making a total for the 22 months of $660.

Prevailing Wage Rate

20. On cotton, timber, and cane plantations the prevailing wage rate was 15 cents per hour for common labor, but it is not shown that 15 cents per hour was paid for levee work at any time. On the Viva-Fordoche job, without Code requirements, which was done immediately subsequent to the instant contract and adjoining the instant job, plaintiff paid 20 to 25 cents per hour. On another job in the general vicinity, with no Code requirements, common labor was paid 30 cents per hour. The defendant paid during the past 6 or 7 years, at various times, 25 cents per hour. Plaintiff paid on the instant contract, from June 24, 1935, when the job began, to August 5, 1935, when the Code rate commenced, 25 cents, 27½ cents, and 30 cents per hour, which were the wages demanded by the laborers at the time and place. Plaintiff contends that it paid this higher wage rate in order to get the job started, but expected later to pay the prevailing wage rate claimed by it, when other labor came in. Plaintiff's records show a continuation of employment of the men initially employed on the job.

It is determined that the prevailing wage rate in that section for levee construction work during the period of the instant contract was 25 cents per hour for common labor, 25

cents per hour for teamsters, 31¼ cents per hour for oilers, and 37½ cents per hour for spotters.

21. Based on the prevailing wage rate as shown in finding 20, plaintiff's total excess costs for the performance of the contract resulting from the compliance with the requirements of the code amount to $17,287.18.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff is suing to recover extra costs of performance of a levee construction contract with the defendant, caused by the defendant's insistence on compliance with the minimum wage and maximum hour provisions of a Code of Fair Competition promulgated under Title I of the National Industrial Recovery Act. It is plaintiff's position that compliance with the Code was not required by the contract.

The invitations to bid on a contract for the construction of Bayou Fordoche-Lottie Levee were issued by the District Engineer at New Orleans May 11, 1935, and specified May 31, 1935, as the date on which bids would be opened. The invitation required that the bid contain the following statement:

> It is hereby certified that the undersigned is complying with and will continue to comply with each approved Code of Fair Competition to which it is subject, and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then as to such trade or industry it has become a party to and is complying with, and will continue to comply with, an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.

The contract specifications contained the following provision:

> 36. *Code Compliance.*—The contractor agrees that he will comply with each approved Code of Fair Competition to which he is subject and if engaged in a trade or industry for which there is no approved Code of Fair Competition, then, as to such trade or industry, with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.

> The United States shall have the right to cancel this contract for failure to comply with this provision, and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor.

Prior to the filing of plaintiff's bid, and on May 27, 1935, the Supreme Court of the United States rendered its decision that Title I of the National Industrial Recovery Act was unconstitutional.[1] Plaintiff's bid was dated May 20, 1935, but the bid price was not inserted until May 30, 1935, three days after the decision of the Supreme Court. Plaintiff assumed that the requirement of compliance with the Codes would not be enforced and figured its price without regard to the minimum wage and maximum hour provisions of the applicable code, the Code of Fair Competition for the Construction Industry.

Plaintiff presented its bid on May 31, 1935, the date specified in the invitation. Its bid was the low bid and was accepted by the defendant. On June 17, 1935, three copies of the contract were sent to plaintiff for plaintiff to sign and return, which it did. On June 28, 1935, the contracting officer forwarded to plaintiff a copy of the contract signed by both parties, for plaintiff to keep. Attached to the document was a typewritten substitution for paragraph 36 of the specifications, which had not accompanied the paper at the time plaintiff signed it. So far as here material, it provided as follows:

> No employee shall be paid less than the rate of 40 cents per hour which must not be construed as establishing a minimum rate of pay for other than common or unskilled labor * * *; and provided further that such provision shall not be construed to authorize reduction in existing rates; and provided further that no employee shall be permitted to work in excess of forty (40) hours per week or in excess of eight (8) hours in any one calendar day.

Plaintiff did not notice that this statement had been attached until about July 2, 1935, when at the request of the office of the district engineer plaintiff returned the contract

[1] *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

to his office and the typewritten statement was removed from it.

Plaintiff began performance of the work on June 24, 1935, and did not comply with the code requirements as to wages and hours, paying its men 25 to 30 cents per hour for common labor instead of the 40 cents required by the code, and working them without regard to the 8 hour day and 40 hour week maximum set by the code. July 9, 1935, plaintiff wrote to the district engineer informing him that it believed compliance with the code was not required in view of the *Schechter* decision and that it was not following the code scale of hours and wages, and asking his advice. He ruled that plaintiff was obliged by the terms of its contract to adhere to the code rates and this ruling was affirmed on appeal by plaintiff to the Chief of Engineers. Plaintiff was advised that it would not be paid for work performed unless it complied with the code provisions concerning wages and hours, and, under protest, it complied.

Two of the unsuccessful bidders had submitted with their bids statements making a reduction in the amount of the bid price if the code should not be enforced. Plaintiff raised no question, however, until after its bid had been accepted.

The defendant maintains that plaintiff contracted to comply with the wage and hour provisions of the Construction Industry Code and that the agreement was in no way affected by the invalidity of Title I of the National Industrial Recovery Act. Plaintiff, on the other hand, relying on the wording of paragraph 36 of the specifications, asserts that in view of the *Schechter* decision, there was no "approved" code to which it was "subject" since the court had disapproved all codes and held that no persons were subject to the codes.

We think that plaintiff's promise, when it said it would obey the labor provisions of the code to which it was subject, was a promise to comply with these codes as applicable law. By so promising, a contractor added to his legal obligations by giving the government rights *ex contractu* in addition to whatever sanctions, criminal or otherwise, other

employers may have been subject to. But we think that the scope of the contractual obligation was not intended to be broader than the scope of the legal obligation. If, laying aside the question of constitutionality, the Recovery Act which was the charter for the codes had been repealed, or if the Code Authority had set a lower code standard, or a higher one, we do not think that the government could have validly claimed that plaintiff was bound contractually to the code provisions as they existed at the time plaintiff was invited to bid, or prepared its bid, on the contract, or that plaintiff could have properly refused to comply with a higher standard set by the Code Authority on the ground that its promise was based on the legal effect which the codes had had at the time it prepared its bid. In short, plaintiff's promise was one which would become more onerous, or less so, or completely ineffective, as the legal effect of the codes varied. It was not a static obligation.

When the *Schechter* case was decided, the codes became legally ineffective. No one was "subject" to them any longer. The possibility that the code standards might be changed to make them less burdensome to plaintiff, or more so, than they were at the time plaintiff prepared its bid was gone. If the government desired to substitute in the contract a fixed standard of wages and hours instead of the formerly flexible one of the code, it might be expected to say so. That this thought apparently occurred to some now unidentifiable person in the office of the district engineer is shown by the incident of the attachment to and early removal from plaintiff's copy of the contract of the typewritten substitute for paragraph 36 of the specifications. We think that if more was expected of plaintiff than that it obey the law of the codes, the defendant, which drafted the contract, should have made that expectation clear. It cannot even be said in extenuation that the matter was not drawn to the attention of the defendant's agents, for two of the bidders whose bids were before those agents when plaintiff's bid was considered and accepted had made alternative bids which must have drawn attention to the need for clarification of the contract in view of the *Schechter* decision.

We conclude that plaintiff was not bound by the contract to pay any specific minimum wage, but that it was free to hire its labor for what it could get it for. The defendant's threat to withhold payments due under the contract if plaintiff exercised that privilege was intended to have, and did have, the effect of coercing plaintiff into foregoing the privilege. As a consequence, we have found that plaintiff expended $17,287.18 more for wages than it would otherwise have done.

The defendant urges that plaintiff has not proved what the prevailing wages were during the period of plaintiff's performance of the contract, and hence has furnished us no basis for determining the difference between the wages plaintiff in fact paid and those it would have paid, absent the defendant's coercion. We think the evidence on this question is adequate. It shows what wages plaintiff did pay in the early weeks of its performance before it was required to pay the "code" wages. It shows that there was no substantial fluctuation in the prevailing wage rates during the period. It shows that the defendant itself, during the period of plaintiff's performance, was hiring labor on nearby work at 25 cents per hour which is what plaintiff claims it could have secured labor for if it had been permitted.

Plaintiff is entitled to recover $17,287.18. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JOHN K. RUFF, TRADING AS JOHN K. RUFF COMPANY, v. THE UNITED STATES

[No. 45298. Decided April 6, 1942]

On the Proofs

Government contract; construction of post office building at Reading, Pa.—Where plaintiff, in response to defendant's invitation, bid upon and was awarded the contract for the construction of the post office building at Reading, Pa.; it is *held* that plaintiff is entitled to recover for:

Syllabus

(1) The value of a "diner" restaurant building which plaintiff was led to believe, by the drawings, plans and specifications, plaintiff would be allowed to remove as salvage but which was removed by another, to whom said diner belonged;

(2) The cost of excavating a large part of the area covered by a three-story brick building on the site, the drawings showing that the said area had been excavated but which had not been so excavated;

(3) The extra cost of excavating rock found within a part of the area of excavation for the new building, an unexpected condition for which plaintiff was entitled to extra compensation under the contract.

Same; reasonable meaning of representations.—Where there was an error in the street numbers of the existing buildings as given on the drawing furnished by the defendant; it is *held* that the defendant is bound by the meaning which plaintiff reasonably gathered from the defendant's writings and plaintiff is entitled to recover for the salvage value of the diner for which plaintiff had made allowance in estimating the amount of his bid.

Same; additional excavation.—Where the drawing furnished by defendant indicated that the area of the three-story building on the site had already been completely excavated; and where an examination of the area, though carelessly made, by plaintiff's excavation subcontractor did not disclose a contrary condition; and where plaintiff's bid, based on such drawing and examination, did not contemplate the necessity for excavating under a considerable part of said building; it is *held* that plaintiff is entitled to recover for the cost of the additional excavation.

Same; erroneous statement; caveatory admonition.—Where an erroneous statement is made in such circumstances that it has the natural effect of misleading the person to whom it is addressed, its consequences are not to be removed by a caveatory admonition made elsewhere.

Same; decision of contracting officer; lack of supporting evidence.—Where the contract provided that all disputes concerning questions of fact were to be decided by the contracting officer, subject to appeal to the head of the department, whose decision was to be final; and where with respect to soil conditions encountered in excavating there is no evidence that anyone who took part in the negotiation of the contract, on either side, anticipated the condition that was actually encountered; it is *held* that the decisions of the defendant's representatives were lacking in any substantial support in the evidence and the Court of Claims accordingly has jurisdiction of the question at issue.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff. *Messrs. William F. Kelly* and *P. J. J. Nicolaides* were on the brief.

Mr. H. A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is an individual, trading, during the times involved herein, as "John K. Ruff Company," with his office at Baltimore, Maryland.

2. Plaintiff was the successful bidder for the construction of a post office at Reading, Pennsylvania, and on September 24, 1938, was awarded the contract which was thereupon signed by plaintiff, and by the defendant by its contracting officer, H. E. Collins, Acting Director of Procurement, Treasury Department.

A copy of the contract and its component specifications is in evidence and made part hereof by reference.

The consideration named was $351,200.00. The work was performed, the building accepted and the contract price paid. The last voucher presented for payment was endorsed by plaintiff:

> Without release and with full reservation of right to sue and recover for additional compensation for excavations under Supreme Realty Co. Bldg., additional rock excavations, and reimbursement of value of Dining Car removed from the site, total $15,457.74, all as heretofore claimed and unpaid by the United States.

3. As a prospective bidder plaintiff was furnished copies of the proposed contract, drawings, plans, and specifications, together with an informative drawing, No. X–1–A. Section 5 of the specifications, under the head of "Demolition," included the following paragraphs:

> 5–1. Bidders should examine the premises or the site of the work and inform themselves as to its character and the type of structures to be removed. Failure to take this precaution will not relieve the successful bidder from the necessity of furnishing all material and labor necessary to complete the contract without additional cost to the Government.

5–2. The Contractor shall take the site as he finds it and shall remove all old structures within the lot lines. This work shall include the removal of interior walls, piers, partitions, chimneys, stairs, etc., in old basements or cellars. Exterior walls of basements, cellars, or other excavations below grade that act as retaining walls, and all walls, paving, or floor slabs on earth, will be removed as specified under Excavation, Filling, and Grading.

5–3. Common brick and framing lumber taken from old structures on the site may be reused by the Contractor in the new construction, provided they are suitable and comply with the contract requirements. All other material removed shall become the property of the Contractor and shall be taken from the premises as the storage of such old materials or equipment on the site will not be permitted.

5–4. Bidders shall take into account the salvage value to them of materials removed, and such value shall be reflected in the bids.

Paragraph 3–2 of "General Requirements" of the specifications provided:

3–2. Drawing No. X–1–A relating to conditions of the site is not to become a contract drawing. It is furnished bidders only for such use as they may choose to make of it. The accuracy of data given on this drawing is not guaranteed. The structure known as the "Supreme Realty Company" (27–29 North 5th Street) on Drawing No. X–1–A has been or will be removed to the top of the foundation walls or to the ground level by others.

And paragraph 3–6 provided:

3–6. The contract will also include the demolition of all structures on the site, except that known as the "Supreme Realty Company" (27–29, North 5th Street) which will be removed to the top of the foundation walls or to the ground level by others.

The site was a square bounded on the north by Washington Street, on the east by Church Street, on the south by Court Street, and on the west by North Fifth Street.

Drawing X–1–A is in evidence as plaintiff's Exhibit No. 5 and is made part hereof by reference. It shows the site divided into six several lots denominated (1) "Present Post Office Building," (2) "This Property from Supreme Realty

Company," (3) "This Property from Harvey S. Adams, Receiver for Reading National Bank and Trust Company," (4) "This Property from Berks County Trust Company," (5) "This Property from B. F. Owen Estate," and (6) "This Property from John Keim Stouffer et al."

On the north, on Washington Street, was indicated the site of the old post-office extending from North Fifth to Church Street, adjoining to the south the Supreme Realty property, which extended in a strip from North Fifth to Church Street, and next to the Supreme Realty property the Adams property fronting on North Fifth Street but not extending through to Church Street. In the front part of the Adams property there was inscribed on the drawing: "Wood Dining Car on Temporary Concrete Slab and Wood Framing between Walls."

Drawing X–1–A did not indicate street numbers.

Before bids were received the Procurement Division, Public Buildings Branch, Treasury Department, Washington, D. C., which was then in charge of the project and had prepared the specifications, received the following communication from one of the other prospective bidders:

> Reference is made to specifications for the construction of the U. S. Post Office at Reading, Penna., dated July 18th, 1938, bid due August 26, 1938
>
> Under the caption "Demolition," Section 5, Page 20, bidders are required to remove all buildings now located on the site. Under "General Requirements," Section 3, Paragraph 3–6, Page 11, contractor is required to include the demolition of all structures on the site except that known as the Supreme Realty Co., 27 to 29 N. 5th Street, which will be removed to the top of foundation walls or to the ground level by others.
>
> In checking the survey plan with conditions at the site, we find that the Supreme Realty Co. building is really Nos. 31 to 33 N. 5th Street and that location 27 to 29 N. 5th Street has been demolished with the exception of a movable diner. The Supreme Realty Co. building is a large structure and if it is intended that this building be demolished by the contractor, the discrepancy in the specifications should be eliminated.
>
> Will you be good enough to include an explanation in any Bulletins which may be issued.

Upon receipt of this communication the Procurement Division, without inspecting conditions at the site, added to paragraph 3–6 of the specifications: "The demolition of the 'Supreme Realty Company' building at 31–33 North Fifth Street will be included in the contract," and notified the bidders of the change.

The Supreme Realty building was in fact located on the lot designated in drawing No. X–1–A as from the Supreme Realty Company and the building had painted on it, in customary places, the numbers 31 and 33.

The so-called "dining car," indicated on drawing X–1–A as on the Adams lot, fronted on North Fifth Street and bore no street number. Its address was known to the local post-office as "27–29 North Fifth Street."

4. The so-called "dining car" was a restaurant fashioned to look somewhat like a dining car, rested on foundations and had a basement for a storage and the usual services of a city building, such as gas, water, and sewerage. It was what is known as a double diner, having twice the width of the ordinary one.

Plaintiff assumed from a reading of the proposed specifications that in the work of removal or demolition of existing structures the diner was to become his property and be removed or demolished by him.

Plaintiff on inspection determined that the salvage value of the diner to him was $7,500 and therefore reduced his bid by that amount from what it otherwise would have been.

Early in October 1938, plaintiff learned that the diner was not the property of the Government and was to be removed by the owner. Plaintiff complained of this to the Procurement Division, which replied to plaintiff by a letter of October 12, 1938, as follows:

> Reference is made to your letter of October 10th, regarding the ownership of the diner located on the site on which the post-office building is to be constructed.
>
> This diner is owned by Mr. Walter J. Moore who rents from the Government the ground at 27–29 North Fifth Street on which the diner is located. Under the terms of the rental agreement, Mr. Moore will be directed to remove the diner.

> In connection with your inquiry, attention is invited to paragraphs 3-2 and 3-6 of the specifications which advise that the structure on the site known as the Supreme Realty Company (27-29 North Fifth Street), will be removed to the top of the foundation walls or to the ground level by others, and paragraph 3-6 of the addendum which advises that the demolition of the Supreme Realty Company's building, 31-33 North Fifth Street, will be included in the contract.

The diner was removed by others and plaintiff did not obtain it.

Plaintiff actively prosecuted his claim concerning the diner before the Treasury Department, Procurement Division, and its successor, Federal Works Agency, Public Buildings Administration. The acting Commissioner of Public Buildings at last rejected the claim October 13, 1939, and on appeal to him the Administrator of the Federal Works Agency, July 1, 1940, refused to set aside the rejection, and the claim has not been paid.

5. Drawing X-1-A indicated a three-story brick building on the Supreme Realty Company site, which, as heretofore stated, extended through from North Fifth Street to Church Street. The Supreme Realty Company site was about 30 feet by 228 feet, and about midway between the lines of North Fifth Street and Church Street there appeared on the drawing the notation "Concr. Basement Floor full length." This legend, taken by itself, represented to bidders that a basement underlay the full length of the building.

Mr. Herfurth, plaintiff's prospective subcontractor for the work of demolition and excavation, had visited the site prior to the submission of plaintiff's bid. He had entered the basement of the Supreme Realty Building both from the North Fifth Street end and the Church Street end. In entering from North Fifth Street, he first stepped into an areaway, on one side of which was the basement boiler room adjoining the street and on the other side of which, away from the street, was a door opening into a tunnel running lengthwise of the building and the floor of which was about 2 feet higher than the ground level of the areaway. The tunnel was about 5 feet wide and 5 feet 6 inches high. Mr. Herfurth did not investigate further than by looking into

the entrance of the tunnel with a flashlight having a visibility of about 25 feet.

He also entered the building from Church Street and found a basement room in front, then an areaway and on the inward side of the areaway a wall with a vault door which was locked and could not be opened. Mr. Herfurth concluded that the vault door led into a room enclosed by the wall which he had seen from the North Fifth Street entrance and the wall along the side of the tunnel. Mr. Herfurth's investigation was not, in the circumstances, a careful and adequate investigation to ascertain whether or not there was further excavation to be done under the Supreme Realty Building. This lack of a more adequate investigation was induced by the defendant's erroneous representation on drawing X-1-A that there was a basement under the entire building.

In making up his bid plaintiff included nothing for excavation under the Supreme Realty Building. In fact, the whole area between the basement room on North Fifth Street and that on Church Street was unexcavated, excepting the area of the tunnel.

Claiming that this necessary excavation was not called for by the contract plaintiff presented to the Procurement Division January 27, 1939, a proposal of $2,960.44 for the work. February 6, 1939, the Director of Procurement advised plaintiff that the excavation would have to be proceeded with, but that the construction engineer for the Government would investigate the situation and record the costs.

Plaintiff, by his subcontractor, completed the disputed excavation and claimed the extra costs. The Director of Procurement formally denied the claim June 3, 1939.

The Commissioner of Public Buildings, Federal Works Agency, on plaintiff's application for reconsideration, advised plaintiff by letter September 26, 1939, as follows:

> Receipt is acknowledged of your letter of September 20, asking that reconsideration be given to your claim for the cost of excavation in connection with your contract for the construction of the Reading, Pennsylvania, Post Office.

It is noted that your claim is based on Paragraph 24 of the "General Conditions" of the contract in that you discovered a condition existing beneath the Supreme Realty Building which materially differed from that shown on the drawings as the drawings indicated that the basement was entirely excavated while, in fact, a large portion of it was unexcavated.

An inspection of the records of this office and drawings and specifications does not indicate that the assumption that the full basement at the front of the building extended throughout the length of the building is tenable, especially in view of the fact that neither contract drawing No. 1–1 nor the X drawing gives any information as to whether a basement existed under the entire length of the building or only a part basement.

A visit to the site would have indicated that the full basement under the front portion of the building ended at the transverse brick wall the full height of the basement. Without a special investigation it could only have been an assumption that a full basement lay behind this wall.

It would appear that your claim does not fall within the provisions of Paragraph 24 of the "General Conditions" as neither "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated on the specifications," nor "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," were found during the course of your operations.

There is nothing contained in your letter which would change the decision made in office letter of August 2, and the rejection of your claim stands.

Upon appeal from this decision the Administrator, Federal Works Agency, July 1, 1940, confirmed the findings of the Commissioner of Public Buildings and denied the appeal.

The actual cost to plaintiff's subcontractor of excavating under the Supreme Realty Building was $2,374.56, which plus 10% for overhead and 10% profit amounted to $2,873.22.

6. Drawing X–1–A indicated a test pit in a grass plot between the old post-office building and the Supreme Realty Company building, and the nature of samples therefrom, as follows:

ELEVATION	
256.00–252.50	Top soil, old fill and firm yellow clay
252.50–250.00	Firm yellow clay
250.00–247.00	Slightly softer yellow clay
247.00–244.67	Same
244.67–241.58	Same
241.58–241.00	Hardpan-yellow clay

Drawing X-1-A contained the following notes on a survey of soil conditions:

> Open Space available for only ONE test pit as shown. Although five samples were taken—the soil was essentially the same throughout, firm yellow clay. This identical kind of soil was found in other excavations in the vicinity of the site. Information obtained from the contractors for these excavations, and is summarized below. Engineers and Architects in this region generally assume bearing value of this soil to be 4,000 lbs. per square foot.
>
> Berkshire Hotel Addition at East End—Across street from site—About 1926—Depth excavated 20 feet—All the same kind of yellow clay.
>
> Abraham Lincoln Hotel—Diagonally across street from site—1929—Depth excavated 23 feet—All the same kind of yellow clay.
>
> Reading Trust Co.—South side Court Street opposite site—Depth excavated 15 feet—All the same kind of yellow clay.
>
> Western Union Telegraph Co.—Manhole at Fifth and Court Streets and cable south to Western office—1936—Depth excavated 5 feet—All the same kind of yellow clay.
>
> Cable—50 ft. north of Penn Street on Fifth Street—one block south of site—1930—Depth 11 feet—All across Fifth Street—Same yellow clay.
>
> Comfort Station at S. W. corner Fifth and Penn Streets—Slightly over one block south from site—1924—Depth 18 feet—Same yellow clay.
>
> Ganster Bldg.—S. W. corner Fifth and Walnut Streets—Less than one block north of site—Depth 12 feet—1924—All same yellow clay.
>
> Court House—N. W. corner Sixth and Court Streets—One block east of site—Depth 30 feet (caissons also)—Practically all the same yellow clay—1931.
>
> Nearest rock outcrop is two blocks west of site on Washington Street.

Among numerous drawings made a part of the contract was a drawing assigned the number 1-1 and designated "Ap-

proach Plan." Noted on this drawing was the direction: "For test pit, see section and notes on survey dr'w'g No. X-1-A." Drawing No. 1-1 is filed in evidence and made part hereof by reference. Location of the test pit in relation to the new post-office building is indicated on drawing No. 1-1 as near the center thereof.

In compiling his bid plaintiff assumed that all the excavation would be of the nature of the material excavated from the test pit.

Paragraph 6-2 of the specifications recited:

> The Government assumes no responsibility for accuracy of data indicated by test pits or borings, such data being merely for the purpose of making available to the prospective bidders such information as the Government has available and for such use as they care to make of it.

There is no evidence that the information given concerning the test pit and the soil conditions in the area surrounding the site was inaccurate.

An ordinarily prudent and competent bidder would not have concluded from an examination of drawing X-1-A and reading the survey notes thereon that there was any considerable likelihood that rock would be encountered in excavating the site in the areas designated in the contract.

Plaintiff encountered rock in excavating for the footings on the work, and so notified the Procurement Division by letter of January 7, 1939, and asked for an extension of time for completion. February 8, 1939, plaintiff asked for additional compensation for the cost of the rock excavation, which was refused February 15, 1939. Plaintiff appealed to the Secretary of the Treasury March 15, 1939, and on December 20, 1939, the Administrator of the Federal Works Agency denied the appeal.

The rock so encountered was excavated by plaintiff's subcontractor at a cost of $2,749.27 in excess of the cost of excavating yellow clay. The addition of 10% overhead and 10% profit makes a total of $3,326.62.

7. The contract contained the following provisions:

> ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the

progress of the work, subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge* delivered the opinion of the court:

In 1938 plaintiff, in response to the defendant's invitation, bid upon and was awarded the contract for the construction of a new post office building at Reading, Pa. In this suit plaintiff seeks compensation, beyond the amount specified in the contract and already paid him, for three items: (1) the value of a "diner" restaurant building, which, plaintiff says, the defendant agreed that he might salvage from the site, but which was removed by another person, to whom it belonged; (2) the cost of excavating a large part of the area formerly covered by the Supreme Realty Company building, which area, plaintiff says, the defendant represented had been excavated before the contract was made; (3) the extra cost of excavating rock found within

a part of the area of excavation for the new building, plaintiff asserting that the existence of this rock was an unexpected condition encountered in the performance of the contract which entitled him to extra compensation under Article 4 of the contract.

As to the claim for the diner, the pertinent facts are as follows. The defendant sent plaintiff, as a prospective bidder, the proposed specifications which were to be a part of the contract. Paragraphs 3–2 and 3–6 of these specifications said, respectively:

> 3–2. Drawing No. X–1–A relating to conditions of the site is not to become a contract drawing. It is furnished bidders only for such use as they may choose to make of it. The accuracy of data given on this drawing is not guaranteed. The structure known as the "Supreme Realty Company" (27–29 North 5th Street) on Drawing No. X–1–A has been or will be removed to the top of the foundation walls or to the ground level by others.
>
> * * * * *
>
> 3–6. The contract will also include the demolition of all structures on the site, except that known as the "Supreme Realty Company" (27–29 North 5th Street), which will be removed to the top of the foundation walls or to the ground level by others.

Drawing No. X–1–A was a plat of the square on which the new post office was to be erected. It showed the several tracts making up the square, the names of their former owners, and what structures were on them. One lot was marked "This property from Supreme Realty Company." The drawing showed a three story brick building occupying this entire lot from Fifth Street to Church Street. The adjoining lot to the south, fronting on Fifth Street and extending only a part of the way toward Church Street, was marked "This property from Harvey S. Adams * * *," and the drawing showed a "diner" restaurant located on the west frontage of the lot. The Supreme Realty Company building had two street numbers, 31 and 33, painted on its front in appropriate places. The "diner" had no numbers marked on it but was known to the local post office staff as Nos. 27–29 for mail delivery purposes.

Plaintiff read the specification as meaning that the three-story brick building would be removed by others, and that he could, if he got the contract, remove the diner as his own. As he was admonished to do by paragraph 5–4 of the specifications (see finding 3), he gave it a salvage value and reduced his bid by that amount, $7,500.00, which was the reasonable value of the diner. Another bidder, who discovered before the day for submission of bids that the street numbers 27–29, attributed to the Supreme Realty Company building in the specifications, did not belong to the building shown on the drawing as that building, asked the defendant for a clarifying statement. The defendant then notified all prospective bidders that it was adding to paragraph 3–6 of the specifications the following language: "The demolition of the 'Supreme Realty Company' building at 31–33 North Fifth Street will be included in the contract."

Plaintiff read this addendum as meaning that the defendant was changing the specifications so that it now expected the contractor to remove the three-story brick building, which, plaintiff had supposed, was to have been removed by others under the original specifications. We have concluded that that was the meaning reasonably to be gathered from the defendant's writings. The statement in the original specifications that "the contractor is required to include the demolition of all structures on the site except that known as the Supreme Realty Company * * *, which will be removed * * * by others" applied exactly to the three-story brick building as the only building not to be removed, so far as the drawing was concerned, and applied with equal exactness to the physical situation disclosed by an inspection of the site, except as to the street numbers assigned to the building in the specifications. It was not to be expected that a prospective bidder would look at the numbers on the building, when he was told that it was to be removed by someone else. The fact that there were no numbers on the diner made it even more unlikely that one inspecting the site would, by chance, discover the defendant's error. We think, therefore, that the defendant is bound by the meaning which plaintiff reasonably gathered from the defend-

ant's writings, and must compensate plaintiff for the loss of the diner which plaintiff expected to get.

The controversy about the excavation under the Supreme Realty building arose as follows. Drawing No. X–1–A, hereinbefore referred to as having been sent out by the defendant with the specifications, contained the legend on the site of the Supreme Realty Building, which was about 30 feet wide and 228 feet long, "Concr. Basement Floor full length." This legend was written at about the center of the site as shown on the drawing.

Plaintiff's prospective subcontractor for the demolition and excavation required by the contract, a Mr. Herfurth, visited the site and made his bid to plaintiff before plaintiff made his bid to the defendant. His examination of the site is described in finding 5. In spite of the fact that he was a demolition and excavation contractor of long experience, and that he had the greatest possible financial interest in not overlooking any work which would be required under the contract, we think that he was, in some degree, careless in his inspection. This carelessness was induced by the erroneous and misleading legend on the defendant's drawing No. X–1–A. That legend conveyed the meaning that the site of the building was already excavated. We think that where such an erroneous statement is made in such circumstances that it has the natural effect of misleading the person to whom it is addressed, its consequences are not removed by a caveatory admonition such as that of paragraph 3–2 of the specifications (see finding 3). We recognize that the language of that paragraph, "The accuracy of data given on this drawing is not guaranteed," is a pointed warning. Yet the statement on the drawing ought not to have been made at all if the one who made it had no knowledge of the facts. If on the other hand, he made an examination and reached the same conclusion that Herfurth did, the discovery of the true situation would have been as unexpected to him as it was to Herfurth and plaintiff. If that is what happened, plaintiff would seem to be entitled to the relief contemplated by Article 4 of the contract, discussed hereinafter. Plaintiff's bid did not contemplate the

necessity for excavation under a considerable part of the Supreme Realty Building. His omission was induced by the defendant's misleading drawing. We think the defendant should not gain such an advantage from its use of this drawing, and we conclude that plaintiff may recover the cost of the additional excavation. See *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1; *Hollerbach* v. *United States*, 233 U. S. 165.

The basis of plaintiff's third claim is, as we have said, that the rock which he encountered in excavating the site was a "subsurface and/or latent condition at the site materially differing from those shown on the drawings or indicated in the specifications" or was "an unknown condition of an unusual nature differing from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," and that he was entitled to additional compensation under Article 4 of the contract (see finding 7).

Drawing 1–1, designated "Approach Plan," was made a part of the contract. It incorporated by reference the information shown on drawing X–1–A relating to the nature of the soil as disclosed by a test pit dug by the defendant and eight other excavations made by various persons in connection with other building operations in the area surrounding the block on which the new post office was to be built (see finding 6). The drawing said that there was no place on the site to dig another test pit. The notes showed that no rock was encountered in the test pit, although it was dug several feet deeper than plaintiff was required to excavate, and that none was encountered in the other nearby excavations. They said "nearest rock outcrop is two blocks west of site on Washington Street."

It seems to us that the purpose of the defendant in giving this information to prospective bidders was to induce them to bid upon the assumption that the material to be excavated was, on the whole, not more solid than yellow clay. All the emphasis and shading of the expression of the information was in that direction, as a reading of the notes will show. For example, the concluding statement did not

say simply "There is outcropping rock two blocks west of site on Washington Street," which a bidder might have taken as a warning. It said, after stating that on the site, and around it, nothing but yellow clay had been encountered, "Nearest rock outcrop is two blocks west of the site on Washington Street." The effect of the statements was to cause Herfurth, an experienced excavator, and plaintiff, an experienced builder, to expect to find yellow clay and to bid accordingly, to their financial hurt.

The defendant's witness, Lund, who had not prepared the specifications, testified that the data given pointed plainly, when read by an informed person, to the probability of rock on the site. We think that this was wisdom after the event. It is charitable to conclude, and we do conclude without resorting to charity, that the persons who prepared the drawing and the notes for the defendant did not anticipate rock excavation. If we are wrong about this, and those persons did read the data as indicating rock, they set a trap for the bidders and caught plaintiff.

We think, therefore, that the subsurface condition was an unforeseen one, within the meaning of Article 4 of the contract, and that plaintiff was entitled to an adjustment of price, and not having received it, he is here entitled to compensation for the unexpected work. If this situation is not within the contemplation of Article 4, the alternative is that bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered. Such a practice would be very costly to the defendant. We suppose that the whole purpose of inserting Article 4 in the defendant's contracts was to induce bidders not to do that.

Article 15 of the contract provided:

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall proceed diligently with the work as directed.

The defendant urges that, there having been a determination of the contracting officer which was affirmed on appeal by the head of the department, as to each of the items here sued for by plaintiff, the court is not free to determine plaintiff's rights. As to the claims concerning the diner and the additional excavation under the Supreme Realty Building, we think that the question at issue is a question of law. It is, in brief, "what are the legal consequences, in the way of contractual liability on the part of the defendant, of certain representations made by it in connection with its invitation to plaintiff to negotiate a contract with it." Such disputes were not covered by Article 15.

As to the third item of dispute, that about the rock unexpectedly encountered in the course of excavation, the real question is whether, in view of the information furnished plaintiff by the defendant with reference to soil conditions on the site and in the neighborhood, the rock was an unanticipated subsurface or latent condition within the meaning of Article 4 of the contract. As to that, there is no evidence that anyone who took part in the negotiation of the contract, either on the side of the defendant or plaintiff, anticipated the condition that was actually encountered. That being so, the decisions of the defendant's officials were lacking any substantial support in the evidence. If the case were being tried to a jury, and the evidence stood as it does here, the court would direct a verdict. We do not believe that plaintiff, in agreeing to Article 4 of the contract, intended to submit his rights under the contract to the hazard of a decision not having any substantial evidence to support it. We think, therefore, that Article 15 does not prevent us from deciding this question also on its merits.

Plaintiff is entitled to recover $13,699.84. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE BATAVIA TIMES PUBLISHING COMPANY v. THE UNITED STATES

[No. 45426. Decided April 6, 1942]

On Demurrer

Trusteeship; collection by attorney in Indian claims cases of printing charges.—Where, at the request of an authorized attorney in certain Indian claims cases then pending in the Court of Claims, plaintiff agreed to print, and did print, the brief in each said case; and where in accordance with a long existing custom in respect of such matters, the said attorney requested plaintiff to deliver to him, and plaintiff did so deliver, receipted bills for voucher purposes only, upon the understanding and agreement that said attorney would collect said funds as funds of the plaintiff and would deliver to plaintiff the Government's check, duly endorsed; and where said receipted bills were duly approved for payment by the Department of the Interior according to law, and duly transmitted by said Department to the Comptroller General for payment; and where, meanwhile, said attorney died; and where thereupon, the Comptroller General withheld payment of said funds and proceeded to offset same against certain unpaid income taxes due and owing to the Government by said deceased attorney; it is *held* that said funds in truth and fact belonged to plaintiff and said attorney and his estate had no interest therein except as trustee for plaintiff.

Mr. Hugh H. Obear for the plaintiff. *Douglas, Obear & Campbell* were on the brief.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge*, delivered the opinion of the court:

The material facts alleged in the petition are in substance as follows:

In April 1938 there was a cause pending in this court entitled *The Seminole Nation* v. *United States*, in which Paul M. Neibell was attorney of record for the plaintiff, and a cause entitled *The Wichita and Affiliated Tribes, etc.* v. *United States*, in which C. C. Calhoun was the at-

torney of record. Mr. C. C. Calhoun was also of counsel in the *Seminole* case.

The plaintiff herein being requested by the said C. C. Calhoun to print, did undertake and agree with the said C. C. Calhoun to print, and did in fact print at the request of the said C. C. Calhoun the brief in each of the above-mentioned cases. The plaintiff's charge for printing the Seminole Nation brief (L 89) was $135.50 and for printing the Wichita-Caddo brief (E 542) was $96.25, or a total of $231.75 for both briefs, which said charge was a fair and reasonable charge.

In order that payment might be made of the aforesaid publishing charge through authorization of the Indian Bureau of the Department of the Interior and in accordance with the long existing custom prevailing in respect of such matters, the said Calhoun requested the plaintiff to deliver to him receipted bills, for voucher purposes only, for each of the aforesaid printing charges, and the plaintiff did, on the 23rd day of July 1938, although its said accounts had not, nor had any part thereof, then in fact been paid, deliver to the said Calhoun such receipted bills upon the understanding and agreement that the said Calhoun would collect said funds as the funds of the plaintiff and would deliver the Government's check therefor, duly endorsed, to the plaintiff upon receipt thereof. That said practice is one which has long prevailed in many branches of the United States Government.

In due course the aforesaid bills were approved by the Indian Bureau and transmitted to the Comptroller General of the United States for payment.

On the 2nd day of August, 1938, the said Calhoun died leaving due and owing to the United States Government certain unpaid income taxes. The Comptroller General did purport to offset against the said unpaid taxes the amount in his hands which had been transmitted to him by the Indian Bureau for payment to Calhoun, although the said Calhoun had no beneficial interest in said funds whatsoever; and although said Comptroller General was advised of that fact, the said Comptroller General refused to pay the plaintiff herein the said amount so transmitted; that

said funds in truth and fact belonged to the plaintiff and that said Calhoun and his estate had no interest therein except as a trustee for the plaintiff.

Wherefore, the plaintiff asks judgment against the defendant for $231.75.

The defendant demurs to the petition on the ground that it does not state a cause of action.

The argument for defendant presents more specifically two grounds for the demurrer. The first is that there is no privity of contract between the plaintiff and the United States. This was not necessary. Attention is also called to the provisions of the Act of March 2, 1934, 48 Stat., 362, 377, authorizing payment to the attorneys for the Seminole Indians "in such sums as may be necessary to reimburse the attorneys for such proper and necessary expenses as may have been incurred" in the prosecution of the suit and also that the applicable appropriation act of June 22, 1936, 49 Stat. 1597, 1621, making provision for the payment of expenses incurred in the Wichita-Caddo case only authorized payment "for costs and expenses already incurred and those to be incurred by their duly authorized attorneys in the prosecution of the claims of said Indians now pending in the Court of Claims."

We do not think these matters constitute any defense. The general rule is that in the absence of circumstances showing a different intention or understanding, property paid for with the money or assets of one person but the title thereto being taken in the name of another, is subject to a resulting trust arising by operation of law in favor of the person furnishing the consideration, and the party thus obtaining title is a trustee for the person paying the consideration. 65 Corpus Juris, section 154, pages 381, 382, and 383, and cases cited. An essential element to the creation of the trust is that the grantee does not receive and hold the legal title as beneficial owner and this appears clearly in the case before us. It was definitely understood and agreed that Calhoun should have no beneficial interest in the money to be paid for printing. Whatever interest he acquired in this payment was solely for the benefit of the plaintiff.

The statutory provisions above set out authorized payment not merely of the expenses paid, but instead, of expenses "incurred" or "to be incurred" by the attorney for the Indians. When Calhoun contracted for the printing, the expense thereof was "incurred" or "to be incurred" and the money to be paid was due him. The Government completed all arrangements for payment and he was entitled to receive the fund when he died; but in the meantime and before the Government had taken any proceedings to apply the fund to his income tax, he had divested himself of all beneficial interest therein. As Calhoun had an interest in the property merely as trustee the fund in fact belonged to plaintiff and the defendant has taken plaintiff's property and applied it to Calhoun's debt.

It is also urged that the claim of the United States to this money was prior to the claim of the plaintiff under revised statutes, section 3466; Title 31 U. S. C. Sec. 191, but this contention assumes that the money or debt due from the Government belonged to Calhoun when appropriated; whereas the fact is, as shown above, that Calhoun had then no beneficial interest in it, and for that reason the Government had no right to appropriate this fund to the payment of Calhoun's income tax.

It is objected that the transaction between Calhoun and the plaintiff was in effect an assignment or transfer to plaintiff of Calhoun's claim against the Government and that such an assignment is void under the provisions of the U. S. Code, Title 31, Sec. 203. This is immaterial, for a resulting trust always has the same effect in the end as would a valid assignment. A more direct answer to the objection is that the petition does not allege any assignment or transfer, and there was none. The plaintiff obtained title through the law with reference to trusts, and the contention made overlooks the well-established rule that the statute does not embrace cases where there has been a transfer of title by operation of law. See *National Bank of Commerce* v. *Downie*, 218 U. S. 345, and cases cited. It was said in *Western Pacific Co.* v. *United States*, 268 U. S. 271:

> The object of this section is to protect the Government and prevent frauds upon the Treasury. It applies

only to cases of voluntary assignment of demands against the Government, and does not embrace cases where there has been a transfer of title by operation of law.

In this case by operation of law a trust resulted without there being any assignment or transfer. Consequently the statute making transfers and assignments of claims against the United States void has no application.

It is also said that the plaintiff did not pay or furnish anything to the Government which formed the original consideration for the payment of the fund. This is clearly an error because the plaintiff furnished the printing which was the consideration of the debt and delivered vouchered receipts for voucher purposes only for the printing charge, upon the understanding Calhoun would collect the funds due and deliver the Government checks therefor, all of which the petition alleges was a custom or practice which has long prevailed in many branches of the United States Government.

It is also said that if there was any trust it was an express one. We have shown in a prior part of the opinion that all of the forms necessary to create a resulting trust had been consummated; but, if there was an express trust, we think this is entirely immaterial as the plaintiff's rights would remain fixed by operation of law.

The demurrer must be overruled.

The argument of defendant is not made merely on the assumption that for the purpose of the demurrer the allegations of the petition are true. It seems to practically concede that these allegations actually relate the facts in the case. If this is the situation, there is no need to refer the case to a commissioner for findings upon the facts; and unless the defendant should within ten days advise the court of its desire to offer some evidence, the defendant will be considered to have elected to stand on the demurrer and judgment will be rendered for the plaintiff in the amount claimed in the petition.

It is so ordered.

LITTLETON, *Judge*, concurs in the foregoing opinion and in the following concurring opinion.

JONES, *Judge*, concurring:

I concur in the result. The attorney was a mere instrumentality for accomplishing a purpose instituted by and approved by the defendant. Apart from that purpose, as disclosed by the statutes, the attorney had no interest whatever in the briefs as such, or in their printing.

To get a true concept of the background of this contract, the different statutes must be construed together. It must first be remembered that the Indians are in a sense wards of the Government. Their funds are deposited in a special account in the Treasury and their expenditures must be approved by an authorized official of the Government.

By the Act Approved May 20, 1924 (43 Stat. 133, 134), jurisdiction was conferred upon the Court of Claims to hear, examine and render judgment in any and all legal and equitable claims growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe.

To show the complete supervision of the Government over the entire proceeding, we quote from Section 2 of the act:

> * * * The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Seminoles approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. * * *

It will be noted that in this basic act the attorneys employed must be approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and the contract must be executed in behalf of the Indians by a committee chosen under the direction and with the approval of both the Commissioner and the Secretary.

Pursuant to the above act, provision was made in the Appropriation Act of March 2, 1934 (48 Stat. 362, 377), for the sum of not exceeding $5,000.00 which was authorized to be expended out of any money standing to the credit of the Seminole Nation of Indians in the Treasury of the United States, in such sums as might be necessary to reim-

burse the attorneys for such proper and *necessary* [italics ours] expenses as may have been incurred or may be incurred in the investigation of records and preparation, institution and prosecution of suits of the Seminole Nation of Indians against the United States under the Act of May 20, 1924, *supra*. It was further provided that such claims for expenses incurred must be approved by the Secretary of the Interior.

In the Appropriation Act of June 22, 1936 (49 Stat. 1597, 1621), an additional sum was authorized to be expended from the

> tribal funds of the Wichita and affiliated bands of Indians of Oklahoma in the Treasury of the United States, upon proper vouchers to be approved by him, for costs and expenses already incurred and those to be incurred by their duly authorized attorneys in the prosecution of the claims of said Indians now pending in the Court of Claims, * * *

It will thus be seen that in protecting the Indians the defendant authorized through one of its agencies a suit to be brought against the Government in behalf of the Indians. It authorized certain expenses, including the printing of briefs, to be incurred. The attorney was merely the authorized channel through which the printing was ordered. He had no interest in the contract price of the briefs. He was simply the medium through which the contract was entered into, the conduit through which this necessary item of cost was to be paid to the proper party. This is true regardless of whether there was a trust.

It is true that the statute uses the expression "reimbursement" to the attorneys for necessary expenses incurred. This was merely a matter of form.

We look to the substance rather than the form. That substance is made manifest in a reading of the statutes in their entirety. The briefs were printed for and on behalf of the Indians. They were to be paid for out of Indian funds. The entire transaction from the beginning to the end was supervised and directed by the Commissioner of Indian Affairs and the Secretary of the Interior. When the facts are considered in their entirety, it is manifestly a contract implied in fact, if not an express contract, on the

part of the defendant in behalf of the Indians for the printing of the necessary briefs. It was authorized to be made through an attorney, approved by both the Indians and the proper agency of the Government.

To construe the use of the word "reimburse" as riding down the whole course of dealing and manifest purpose that was sought to be accomplished through the supervision of the defendant as provided in the statutes appears as hypertechnical. It is rather apparent from the various acts that the Secretary of the Interior had authority to pay the necessary expenses in any manner he saw fit.

In this connection attention is again called to the fact that these were Indian funds. The expense was to be paid out of Indian funds. To permit the Government to use the funds of its ward to pay the personal debts of an attorney who had been selected with its approval would, to say the least, put the Government in an unfortunate position.

Not only the facts as a whole, but every consideration of justice calls for a recovery on the part of the plaintiff for work actually done under the supervision and direction of the defendant.

Whitaker, *Judge*, concurs in this opinion.

Madden, *Judge*, dissenting:

These are the essential facts, as I see them, in this case. Calhoun ordered from plaintiff the printing of legal briefs for Calhoun's use as attorney for Indian tribes which were suing the United States in this court. Calhoun was entitled to receive payment from the defendant for the amount of the printing cost, as a necessary expense of his representation of the Indian tribes. After the printing was done, he requested of plaintiff receipted bills for the printing in order to present such bills to the defendant as evidence that he was entitled to reimbursement. This was not an unusual request. However, since Calhoun was not financially stable, though personally honorable, Calhoun and plaintiff agreed that, in consideration of Calhoun's being given these receipted bills, Calhoun would, in the language of plaintiff's petition, "collect said funds as the funds of the plaintiff and would deliver

the government's check therefor, duly endorsed, to the plaintiff upon receipt thereof." Plaintiff gave Calhoun the receipted bills on July 23, 1938. Calhoun presented them, with his claim for reimbursement, to the defendant. Calhoun's claim was approved by the Indian Bureau and transmitted to the Comptroller General for authorization for payment. On August 2, 1938, Calhoun died, owing the defendant income taxes. The Comptroller General asserted an offset for these taxes against Calhoun's claim, and it has never been paid. Calhoun's executors in March 1940 advised the Bureau of Indian Affairs and the Comptroller General that Calhoun's estate had no interest in the claim, that it belonged to plaintiff, and should be paid to plaintiff.

This recital seems to me to show that on July 23, 1938, Calhoun made an oral assignment or oral declaration of trust of a claim which he had against the defendant, together with an agreement to make a written indorsement of the check which, it was expected, the defendant would issue in payment of Calhoun's claim, when that check should come into Calhoun's hands. But this agreement to assign, or declaration of trust preliminary to an assignment, was void under the provisions of United States Code, title 31, sec. 203. That section provided that—

> All transfers and assignments of any claim upon the United States * * * shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof.

The agreement between Calhoun and plaintiff comes into complete collision with the statute. If it had the legal effect which plaintiff claims for it, of divesting Calhoun of his beneficial ownership of the claim and vesting that ownership in plaintiff, it was a "transfer" or "assignment" within the meaning of the statute. And not only was the required form for the intended transfer completely disregarded, but the subject matter was, at that stage, not assignable at all, regardless of form. The claim had not been allowed, the amount had not been ascertained, and no warrant had been issued.

The opinion of the court speaks of the transaction as a "resulting trust," such as arises when C pays A for property

and directs that A shall transfer the property to B and there is no proof that C intended to make a gift of the property to B, or that B should become the beneficial owner and should owe C the price paid by C to A. Ours is not, as I see it, such a situation. C (plaintiff) did not pay or furnish A (the Government) anything. It printed briefs for B (Calhoun), on Calhoun's credit. Calhoun, upon delivery of the briefs, became the owner of them, and became entitled under the statute to reimbursement for their cost upon the presentation of the proper evidence. There is no assertion in the petition that at this stage of the transaction plaintiff was relying upon anything other than Calhoun's credit. When, on July 23, plaintiff furnished Calhoun with receipted bills, the evidence required by the statute for Calhoun to receive reimbursement, plaintiff was not furnishing the consideration for the payment which Calhoun was to receive. It was merely supplying Calhoun with evidence necessary to prove his claim. The consideration, the printing of the briefs, had already passed, at a time when, so far as the petition shows, it was intended that Calhoun should own his own claim against the Government, and should owe plaintiff the price of the briefs which plaintiff had printed for him.

But a shorter answer to the resulting trust suggestion is that such a trust is a device invented by the courts to do justice in a situation where evidence is lacking as to what the actual intent of the parties was, and such a trust achieves a result in accordance with what would have been their fair intention if it could have been proved, or with justice, if the parties had no actual intention. Here we have no need to resort to such an invention. Whatever the transaction of the parties was, it was an express one. The petition states just what the parties intended. If the transaction intended is properly defined as a trust, it is an express trust, not a resulting one, and must stand or fall as an express trust.

The concurring opinion is based upon the idea that, looking through the form to the substance of the transaction, the United States was indebted to plaintiff, the printer, for briefs printed for the Indians whose money the United States held. This view places Calhoun, the attorney for the Indians, in the position of an agent for the United States, authorized to incur a printing bill on its behalf,

which it was bound to pay. If this was the real nature of the arrangement, it would follow that plaintiff should recover, since the United States would have no right to set off Calhoun's debt to it against its debt to plaintiff.

I think that this was not the substance of the arrangement. If A agrees with B that he will reimburse B for an expenditure which B may make for a specified purpose, that does not give B an authority to subject A to a debt to C for that purpose. While in most cases it would not be any more burdensome to A to pay C than to reimburse B who has paid him, still that is not what A agreed to do. See 2 *Williston on Contracts*, sec. 402, p. 1157; *Burton* v. *Larkin*, 36 Kan. 246, 13 P. 398, 59 Am. Rep. 541. So C has rights only against B and will get no rights against A except by assignment, or some such proceeding as garnishment. Whatever rights C obtains against A in one of these ways will be subject to offsets and other defenses which any debtor has against his creditor. *Grand Prairie Gravel Co.* v. *Trinity Portland Cement Co.*, (C. C. A. 5) 295 Fed. 140.

The statutes here involved did not, I think, intend to subject the United States to claims by printers, stenographers, hotel keepers, and others who might furnish goods or services to an attorney for the Indians.

There is one problem with reference to the propriety of the offset that might be noticed, although the parties have not mentioned it in briefs or argument. The statutes provided for the payment to Calhoun from the tribal funds belonging to the Indians, but held by the United States. Thus the debt from the United States to Calhoun was owed by it as trustee for the Indians, while Calhoun owed his debt for taxes to the United States as complete and beneficial owner. The right of the United States to set off the one debt against the other is doubtful. If the United States did not have the right of offset which it asserted, plaintiff was not prejudiced, however, except to whatever extent his position as a creditor of Calhoun might have been improved by the payment of this claim into Calhoun's estate. The priority of the tax claim and other priorities would, in all probability, have prevented plaintiff from receiving any benefit from the payment of the claim to the estate.

I would sustain the demurrer.

On June 1, 1942, the court filed the following order in the above case (No. 45426):

ORDER

This case comes before the court on plaintiff's motion for judgment; and it appearing that on April 6, 1942, the court, by opinion, overruled the defendant's demurrer, and stated that "unless the defendant should within ten days advise the court of its desire to offer some evidence, the defendant will be considered to have elected to stand on its demurrer and judgment will be rendered for the plaintiff in the amount claimed in the petition"; and it further appearing that the defendant has not advised the court of its desire so to take evidence, and has filed no objection under the Rules to the allowance of plaintiff's motion for judgment, now, therefore,

It is ordered, this 1st day of June, 1942, that plaintiff's motion for judgment be and the same is allowed as to the entry of judgment and overruled with respect to the allowance of interest, and judgment is now entered for plaintiff in the amount claimed in the petition, to-wit, two hundred thirty-one dollars and seventy-five cents ($231.75).

FORCUM-JAMES COMPANY, INC., v. THE UNITED STATES

[No. 43825. Decided May 4, 1942]

On the Proofs

Government contract; conflict between specifications and conventional drawing.—Where the contract for levee work provided that in case of difference between drawings and specifications, the specifications should govern; and where the specifications showed that more materials would be required for construction in the area involved than were set out in the conventional illustration which was applicable to average conditions; and where plaintiff in submitting its bid based its estimate of materials required upon such conventional drawing and disregarded the specifications; it is *held* that plaintiff is not entitled to recover for extra costs so incurred.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Messrs. King & King* and *Jacob S. Seidman* were on the briefs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Tennessee with its principal office in the City of Dyersburg, Tennessee.

2. On October 8, 1931, plaintiff executed a contract with the United States through the War Department to furnish all labor and materials, and perform all work required for constructing and placing bank protection and a levee set-back in the Headwater Diversion Canal, Little River Drainage District, approximately 7 miles south of Cape Girardeau, Missouri. A copy of the contract and specifications together with three drawings, plaintiff's exhibits A and 1, are by reference made a part hereof.

The contract contained five items of work but the issues here relate only to the manufacture by plaintiff of approximately 4,800 squares of mattress at four dollars and fifty cents ($4.50) per square (100 square feet).

3. A mat or mattress as described in the contract is a usual means employed on river banks to protect the banks from erosion and damage resulting from current action.

The mattress is generally positioned at a point above normal high-water mark and extends down the river bank to a point near the channel of the river. The type of mattress here involved is termed a lumber mattress as it is composed of wooden planks interwoven and secured by nails and wire ties. An illustration of the construction detail of a mattress is shown on Plate 1, plaintiff's exhibit 1, entitled "Standard Specifications, Revetment, Details of Construction."

This drawing is not to scale. It merely illustrates the construction detail of a conventional lumber mattress.

In the lower left-hand corner of this drawing there appears the following schedule:

Materials required under average conditions

Materials	Paving (10,000 sq. ft.)	Mattress (10,000 sq. ft.)
Lumber		10,000 ft. b. m.
Stone	500 c. y.	90 c. y.
Nails & spikes		150 lbs.
Wire & strand		350 lbs.

4. The statement of materials required under average conditions was not an estimate for the particular contract here involved but was designed to illustrate a typical or average requirement of materials for ordinary mattress building. The other two drawings included in plaintiff's exhibit 1 are drawing serial No. 2217 entitled Location Map of the First Field Area, Little River Drainage District, and serial No. 2218, a drawing of details of proposed Revetment Sta. 1307 to 1416. The latter drawing is dimensional and sets forth with precision the extent of the revetment together with section drawings of the proposed work.

Plaintiff started performance of the contract and by December 10, 1931, had constructed 2,360 squares of mattress when it was discovered that the amounts of lumber, nails, and wire utilized were greatly in excess of the estimated quantity of the bid.

5. Plaintiff notified Major Brehon Somervell, the contracting officer, of the excess materials used, and on January 8, 1932, asked for an adjustment of the contract in view of that fact.

6. On March 4, 1932, Major Somervell replied as follows denying the request for adjustment:

> Referring to your letter of Jan. 8, 1932, requesting adjustment for excess materials used in the construction of mattress under your contract No. W-1092-eng. 2047, your attention is invited to Article 2 of the contract wherein it is stated that in case of difference between drawings and specifications, the specifications shall govern.
>
> The bill of materials' table showing quantities used under average conditions is in error when applied to

> your contract, but quantities computed from specifications show only a negligible variance with the actual quantities used. In view of the fact that you were put on notice prior to submission of bid that the specification would govern with reference to the material needed, it does not appear to this office that your claim is one which merits favorable consideration. However, if you are not willing to let the matter stand, you may file claim upon completion of your contract and it will be referred to the General Accounting Office in Washington which audits all accounts of this nature.

7. On March 12, 1932, plaintiff requested that the matter be referred to the General Accounting Office. Thereafter by letter dated July 30, 1934, plaintiff submitted to the War Department a claim for $11,094.43 for excess material and labor supplied on the mattress. This claim was rejected by the General Accounting Office January 3, 1935.

8. On February 18, 1936, in response to plaintiff's request for a review of its claim, the General Accounting Office sustained its decision, and again affirmed it on July 27, 1936 (see defendant's exhibit 2 and plaintiff's exhibit 7–B, made a part hereof by reference).

9. The plaintiff corporation had no previous experience in manufacturing mattresses. The bid was prepared by Mr. Ford, a director of the plaintiff, who likewise was unfamiliar with mattress construction.

The weaving and spacing of the individual planks which make up the body of the mat requires a special experience and a familiarity with such work particularly because if the planks are so positioned that long overlaps occur, much more lumber is used for a given area. The plaintiff's employees and workmen, through lack of knowledge of mattress work, used unnecessary amounts of wire for tying purposes. Also larger sized nails were used in the mat than the specifications required.

These conditions increased the amounts of material used and the cost of production, but there is no evidence as to the amounts so wasted or the value thereof.

10. Article 2 of the contract provides:

> ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the con-

> tracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specification shall govern * * *.

11. Plaintiff admittedly did not consider the specifications in preparing its bid on the mattress. In the communication of July 30, 1934, referred to in finding 7 (plaintiff's exhibit 5, made a part hereof by reference), Mr. C. B. Ford, Secretary and Treasurer of the plaintiff company, stated:

> * * * Immediately prior to entering upon the contract, we ordered and arranged for delivery of the necessary materials in accordance with said requirements called for by said Plate 1.

12. Because of the hurried preparation of its bid, plaintiff failed to include therein an item for stone amounting to $10,557.50. This was brought to the attention of the War Department in the letter of July 30, 1934, plaintiff making the following statement under oath:

> Oversight in Omission of Cost of Stone in Making Contract Bid.
>
> In the hurry of submitting a timely bid, and acting under pressure, while in Louisiana away from our plant headquarters, our Mr. Ford inadvertently omitted the cost of stone for the mattresses in making our cost estimate.

The District Engineer upon opening the bid recognized that an error had been made by the low figures submitted and called plaintiff's attention to the fact. After negotiations the United States paid for the stone which had not been included in the formal bid.

13. The specification sets out the method and means to be employed in constructing the mattress in great detail. The length of the individual planks which are to be woven in the body of the mat, the overlap of such planks, the sizes of nails, and the gauge of the wire ties are all specifically pointed out.

There are, however, portions of the specifications which state requirements which are not capable of exact definition.

In such instances there are maximum requirements expressed which limit the amount of material contemplated.

Paragraph 27 of the specifications contains the following provisions:

> (f) If found necessary, additional headers spaced 50 to 100 feet apart shall be used. * * *
>
> (h) The inner and outer edge of the mattress shall be cribbed for a width of 12 to 24 feet by additional planks * * *. If necessary, the contracting officer may require similar cribbing to be placed over the entire width of the mattress.
>
> (i) From ten to twenty wire strands shall be fastened to the headers and weavers * * *.

14. There is no convincing evidence that the drawings and specifications afford sufficient data or information to determine the exact number of feet of lumber or the amount of wire and nails required under the contract.

Defendant's witnesses, four in number, familiar with mattress construction and with the specifications before them, were unable to agree on the quantity of lumber required for parts of the mattress, or upon the total for the entire work. The contractor's judgment at the time of constructing the mattress determined the specific lengths of planks utilized and the extent of overlap. The United States, through its engineers, during the construction work controlled to a substantial extent the use of materials. See Finding 13.

15. Plaintiff in constructing 2,360 squares of mattress prior to December 10, 1931, has used in excess of the amounts shown on Plate 1 of plaintiff's exhibit No. 1:

40.84 feet of lumber per square at $4.18	$1.71
1.85 lbs. of nails per square at $0.081	.15
12.54 lbs. of wire per square at $0.0816	1.02
Total per square	2.88

The manufacture of 2,360 squares brought the cost of the work to December 10, 1931, to $6,796.60.

16. After December 10, 1931, certain changes were made by the United States engineers which reduced the material costs. On the remaining 2,230.22 squares of mattress, the excess costs over the materials required under average conditions were:

18 ft. of lumber per square at $4.18	$0.752
.57 lbs. of nails per square at $0.081	.046
8.74 lbs. of wire per square at $0.0816	.713
Total per square	1.511

Cost of the excess material for 2,230.22 squares was $3,369.86.

17. Plaintiff was paid $4.50 per square for the mattress covered by the contract and accepted by the United States.

The sum of $10,166.46, the cost of materials and labor set forth as excess, has not been paid.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

On October 8, 1931, plaintiff executed a contract with the War Department to furnish all labor and materials and to perform all work in connection with bank protection and a levee setback in a diversion canal of the Little River Drainage District near Cape Girardeau, Missouri.

The details are set out in the special findings of fact and will not be repeated here.

The single issue is whether the plaintiff is entitled to recover alleged excess cost of materials used in constructing mattresses. The mattresses are used to protect the banks from erosion and damage resulting from the current of the stream. The type here used was known as a lumber mattress, being composed of planks interwoven and secured by wire ties and nails. One end of the mattress was placed above normal high-water mark and the mattress then ran down the river bank so that the other end was near the channel of the river.

In the drawings was an illustration showing the construction detail of a mattress. In the lower left-hand corner of this drawing there appears the following schedule:

Materials required under average conditions

Materials	Paving (10,000 sq. ft.)	Mattress (10,000 sq. ft.)
Lumber		10,000 ft. b. m.
Stone	500 c. y.	90 c. y.
Nails & spikes		150 lbs.
Wire & strand		350 lbs.

Plaintiff used more materials in the actual construction of the squares of mattress than were set out in the plate or illustration. It asks for recovery of the cost of the excess materials used, claiming it had the right to rely on the schedule set out in the drawings as to the amount of materials required for the construction of the average mattress for this particular contract.

Defendant pleads that the plate or drawing was not an estimate for the particular contract but was designed to illustrate a typical or average requirement of materials for ordinary mattress building; that the specifications showed that the mattresses to be constructed in this contract would require more material than shown in the illustration; that the contract provided that in the event of conflict between drawing and specifications the specifications should govern; and that due to its inexperience plaintiff used more materials than were necessary.

In the facts and circumstances of this case plaintiff is not entitled to recover.

Article 2 of the contract contains the following language:

> ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. * * *

The specifications showed that more materials would be required for construction in this area than were set out in the conventional illustration which was applicable to average conditions. The specifications set out the requirements in great detail. While it is probable that the data and information contained in the specifications were not sufficient to permit exact determination of the amount of materials required to fulfill the contract, they were sufficient to enable one experienced in this type of construction to approximate the amount with a reasonable degree of accuracy. The illustration in the drawing was the standard one inserted in

all contracts primarily to show the type of construction desired. It applied to average conditions rather than to any particular project. By the terms of the contract it was modified by and subject to the specifications. This was necessary to meet the actual requirements of differing conditions.

In view of the plain wording of the contract these specifications must govern. Certainly in the light of the provisions of the contract and the definite requirements of the specifications a mere informative illustration shown in the drawings cannot be treated as a warranty that no more materials would be required than indicated for the type shown in the illustration. This is especially true when such a construction would be in the very teeth of both the contract and the specifications.

Plaintiff was inexperienced in this kind of construction. Admittedly it did not consider the specifications in submitting its bid. Nor did it include the cost of stone. The District Engineer upon opening the bids recognized by the low figures submitted that an error had been made and called plaintiff's attention to the omission. After negotiations the defendant paid for the stone which had not been included in the formal bid.

It is also apparent from the evidence that plaintiff used more materials than were necessary, due to overlapping of planks, and that its employees and workmen through lack of knowledge of mattress construction, used unnecessary amounts of wire for tying purposes and larger sized nails than the specifications called for. For these reasons the evidence is somewhat confusing as to just what amount of the materials used was necessary. However, in view of the terms of the contract and specifications and plaintiff's undertaking to furnish all necessary materials, this becomes unimportant.

Accordingly the petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

STRUCK CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43914. Decided May 4, 1942]

On the Proofs

Government contract; use of extra concrete and labor; coercion.—Where plaintiff entered into a contract with the Government, acting through the Federal Emergency Administration of Public Works, for the construction of a State prison in Georgia; and where the concrete mixed in accordance with the specifications was found to be unsatisfactory and the walls of such concrete were rejected by defendant's representatives; and where plaintiff, in order to comply with the requirements of defendant's representatives, was compelled to use more cement and to spend more for labor than performance of its original contract would have required; it is *held* that plaintiff is entitled to recover.

Same; coercion.—Coercion sufficient to avoid a contract need not consist of physical force or threats of it; social or economic pressure illegally or immorally applied may be sufficient.

Same.—It is difficult to apply terms with moral implications, such as "good faith," to impersonal entities such as corporations or governments, which act through agents; it is, however, the responsibility of the entity, the principal, so to coordinate the work of its agents that the aggregate of their actions will conform to required legal standards.

Same; impossible requirements.—Where the defendant's inspection division continued to demand of plaintiff a performance which was repeatedly demonstrated to said division's representatives to be impossible; and where defendant's agents carefully refrained from requesting in so many words that plaintiff add extra cement or do extra labor, yet after having repeatedly refused to approve a sample wall built according to the specifications, did approve a sample wall which they knew contained extra cement and entailed extra labor; it is *held* that such conduct was oppressive and amounted to coercion.

Same; delays by defendant.—It is *held* that in the instant case work was delayed by the defendant when there was delay in approval of a sample wall; delay in approving and returning shop drawings; discovery of an error in the elevations; delaying grading and the laying of a sewer; controversy over the type of couplings to be used in connection with installation of steam pipes; and strict and arbitrary painting inspection.

Same.—The change orders did not preclude plaintiff from seeking damages caused by the defendant.

Same.—There is adequate proof that plaintiff could have used elsewhere machines detained on the job by reason of the delay caused by the defendant, and plaintiff is accordingly entitled to recover for the rental value of the machines for the period of such delay.

Same.—Plaintiff is entitled to recover for the cost of watchmen during the period of delay caused by the defendant.

The Reporter's statement of the case:

Mr. Herman J. Galloway for plaintiff. *King & King* were on the briefs.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. H. Reddy* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Kentucky corporation with its principal place of business in Louisville, and has been engaged in the general contracting business since 1921. Its organizers and principal stockholders had been engaged in a similar line of business for some fifteen years prior to 1921.

2. January 12, 1935, plaintiff entered into a contract with the defendant through its Federal Emergency Administrator of Public Works whereby plaintiff agreed, for a lump sum of $1,083,000, to construct a self-contained penitentiary in Tattnall County, Georgia, in strict accordance with the terms of the contract and written General Conditions, Specifications, and Drawings, all of which were made a part of the contract. The contract, general conditions, specifications, and certain addenda to the specifications which were issued before the bids were filed, were received in evidence as plaintiff's Exhibits 1, 2, 3, and 4 and are made a part hereof by reference. The contract, general conditions, and specifications set out in great detail how the project was to be carried out, the specifications alone containing 325 mimeographed pages. The contract provided that the project was to be completed within eighteen months from the date thereof, that is, on or before July 12, 1936, and that work under the contract was to be commenced within fourteen days after its execution. Plaintiff commenced operations January 24, 1935.

3. The project or "improvement," as it is sometimes referred to in the contract and specifications, consisted of eight connecting buildings and the necessary facilities and equipment, all of which was covered by plaintiff's contract except the furnishing and erecting of the prison steel which was covered by a separate contract between defendant and a party or parties other than plaintiff. The central building, known as building "D," consisted of a central section six stories in height with a wing on each side two stories in height. It contained reception rooms, office and administration rooms, dining hall, hospital rooms, maximum security cells, solitary confinement cells, death chambers, and morgue. A long building, known as building "H," extended back from building "D" and housed the kitchen, power and heating plant, laundry, refrigeration rooms, bakery, mess halls, and vocational training shop. On one side of building "D" and running parallel to one of its wings was building "C"; and building "E" was similarly located on the other side of building "D." These two buildings were similar in construction and each contained a dormitory section and cell block sections. Buildings "A" and "B" were located on the left of, and parallel to, building "C," and buildings "F" and "G" on the right of, and parallel to, building "E." Buildings "A," "B," "F," and "G" were similar in design and construction and were used for dormitories. All the buildings were connected by corridors and underground tunnels, and all the buildings except building "H" were constructed of reinforced concrete walls, floors, and roofs. Building "H" was of steel frame and roof members, with brick walls, concrete floors, and cement tile roof. Plaintiff's contract also included the construction of guard towers, supplying and installing water tanks, a sewage disposal system, the plumbing, heating, sewer, and electric lines and equipment, and drilling deep wells.

4. Under the General Conditions, which were made a part of the contract, certain terms were defined as follows:

> (e) The term "*Administrator*" as used herein refers to the Federal Emergency Administrator of Public Works.

(f) The term "*Division of Inspection*" as used herein refers to the Division of Inspection of the Federal Emergency Administration of Public Works and includes any board, bureau, division, department, instrumentality, or agency of the Government from time to time designated or created to assume the functions, herein provided, of the Division of Inspection.

(g) The term "*State Engineer (P. W. A.)*", as used herein refers to the State Engineer (P. W. A.) for the State of Georgia or any other person or persons from time to time designated by the Administrator to perform his functions.

(h) The term "*State Engineer Inspector*" as used herein refers to any person or persons from time to time designated by the Administrator to be, subject to the orders of the Division of Inspection, his representative or representatives in charge of supervision and inspection of construction of the State of Georgia.

(i) The term "*Supervisor*" as used herein refers to the Resident Engineer Inspector or other person or persons from time to time designated by the Administrator to be, subject to the orders of the State Engineer Inspector and the Division of Inspection, his representative or representatives at the site of the work during the construction of the Improvement, to supervise the construction of the Improvement, to inspect the work of construction, to give all necessary orders to contractors, subcontractors, and their respective employees, and to certify for payment of the cost of the construction of the Improvement, all audited and approved vouchers.

(j) The term "*Accounting Division*" as used herein refers to the Division of Accounts of the Federal Emergency Administration of Public Works and includes any board, bureau, division, department, instrumentality, or agency of the Government from time to time designated or created to assume the functions, herein provided, of the Division of Accounts.

(k) The term "*Project Auditor*" as used herein refers to any person or persons from time to time designated by the Administrator to audit and approve for payment the costs of the Improvement and to prescribe and supervise the methods of keeping the records, books, and accounts necessary or incidental to the construction of the Improvement or to the applications for payments of the cost of the Improvement.

5. The drawings and specifications were prepared by McKendree A. Tucker and Albert A. Howell, Jr., of Atlanta, Georgia, who were designated as the "Architects" where that term was used in the contract documents. J. Houston Johnston of Atlanta, Georgia, was "State Engineer, P. W. A., Georgia" when plaintiff bid on the project and signed the contract, and in such capacity approved the specifications and the addenda to the specifications. H. T. Cole of Atlanta, Georgia, was "State Engineer Inspector" at the time plaintiff bid and signed the contract. Norman O. Head, of Atlanta, Georgia, was designated "Supervisor" January 1, 1935, and at or about the time the work started on the project his title was changed to "Project Engineer," under which title he acted throughout the construction work. In that capacity he was in charge of the work at the project for the Government and generally exercised the functions referred to in the contract and specifications as delegated to the supervisor, with such supervision and control from Washington as will hereinafter appear.

6. Prior to bidding on the contract, plaintiff's president discussed with J. Houston Johnston the supervision of the construction of the project and was advised that supervision was vested in the architects, the P. W. A. state engineer for Georgia, and the supervisor, who were all near the site of the work. After bidding but before the contract was signed, plaintiff's representative again discussed the matter with Mr. Johnston and was again advised that the supervision of the work would be carried out by the officials just referred to. The matter was of some concern to plaintiff for the reason that it was more advantageous to it to have local supervision of the kind mentioned by Mr. Johnston than supervision from Washington.

Mr. Johnston functioned as State Engineer for only a few weeks after work was begun and Mr. Cole, State Engineer Inspector, for an even shorter time, their services terminating about February 1935. Thereafter, their functions under the contract were performed by officers of the Housing Authority in Washington, which was an agency of the Federal Emergency Administration of Public Works. At about the same time the architects were relieved by the defendant

of authority to take final action or give final approval on samples, drawings, material, and equipment, and in most instances thereafter only made recommendations to the officials in Washington who gave final approval.

7. The interior and exterior walls and the footings of all buildings, except building H, were constructed of reinforced concrete which was designated in the specifications as Type "B" concrete, and the outside surfaces were covered with two coats of cement paint. The specifications contained the following provisions:

TYPES OF CONCRETE

Concrete, unless otherwise specified, shall be mixed in the following proportions:

Variations in the grading of the aggregates on which the proportions are based shall be made for the purpose of obtaining a denser or more workable mix when required by the Supervisor but no claim shall be made for extra compensation therefor.

* * * * *

(2) Type "B" concrete shall be used for reinforced concrete work *not* waterproofed. It shall be composed of one (1) part of Portland cement, two and one-half (2½) parts of fine aggregate and four (4) parts of coarse aggregate size ¼″ to ¾″.

* * * * *

ARCHITECTURAL CONCRETE

The photograph bound in this specification shows the degree of smoothness that will be required for all exterior concrete above grade and for interior walls and columns. This Contractor shall build on the job a sample wall 10′ long and 7′ high with one vertical and one horizontal joint in the same. The finish on this sample wall shall match the finish shown on the photograph with a minimum amount of rubbing. Upon completion this sample wall shall be inspected by the Architects. If same does not meet with their approval subsequent sample walls shall be built until approved by the Architects.

The final approved sample wall shall remain intact until the completion of the entire work and shall form a standard of finish which shall be equalled for all exterior and interior concrete except ceilings.

All sample walls not approved shall be destroyed when final wall is approved.

FINISHED SURFACES

All exposed exterior and interior concrete surfaces of the buildings and connecting passageways shall be smooth and equal in all respects to the approved sample wall. All fins, feather edges, or other rough spots that may occasionally occur shall be removed and the surface rubbed smooth and even with fine carborundum blocks.

Where exposed concrete surfaces do not equal the approved sample wall it shall be sufficient cause for that portion of the work to be condemned.

* * * * *

Form Lumber shall be well seasoned #1 common grade. Lumber for forms where smooth surfaces are required shall be matched and dressed to a uniform thickness. Lumber for window heads, jambs and sills; pilasters, entrance details, entrance parapets, water-table, etc., shall be of seasoned finishing grade carefully milled to details.

Form Linings shall be of waterproofed pressed wood fiber board, or plywood and shall be Presdwood as made by the Masonite Corp., Celotex Hard Board as made by the Celotex Corp., or Plycrete as made by the Harbor Plywood Corp.

* * * * *

CONSTRUCTION OF FORMS

The forms for all exterior walls, interior walls, window and door reveals both interior and exterior, columns, parapets, steps and cheeks of same, soffits of stairs, guard towers, etc., except pipe tunnel, boiler room and coal room shall have lined forms using form lining hereinbefore specified, except where molded or chamfered shapes are shown which shall be of milled lumber. All areas less than four (4) feet wide shall be without joint lines. All joints in form lining shall be kept open and pointed with patching plaster or other compound as joints must not show in finished concrete.

The standard form of specifications and details of the manufacturer of the form lining used shall be followed and shall become a part of this contract same as if written into these specifications, except that this contractor shall use added bracing to prevent bulging or

sagging as required. Special care shall be taken to obtain a smooth surface with the minimum of cutting or rubbing hereinafter specified.

* * * * *

Lumber or form lining once used in forms shall have nails withdrawn and surfaces to be in contact with concrete thoroughly cleaned before being reused.

* * * * *

PLACING CONCRETE

* * * * *

Concrete shall be placed in forms for all exterior and interior walls and other places where the concrete is exposed, except slabs, by means of an "elephant trunk" attached to a suitable hopper. The "elephant trunk" shall be kept submerged in the concrete already in place and shall be moved about so as to maintain the surface of the concrete as nearly level as possible at all times. Concrete shall not be permitted to "pile up in high spots" so that grout runs off and joints, dry spots, or honeycombing show after removal of forms. All concrete in slabs and beams shall be flowed into place. Concrete unexposed after completion may be placed in forms in layers not to exceed twelve (12) inches.

PATCHING

Wherever "dry spots," "honeycombing" or other imperfections occur, and wherever tie wires or rods come through, cut out so as to form a dovetailed key, and point or carefully fill in with mortar composed of one (1) part Portland cement to two and one-half (2½) parts sand. Allow mortar to set one hour before using. Wet down holes before pointing or filling. After same has set rub smooth with carborundum block.

Addendum No. 3, issued before bids were submitted, provided:

In lieu of the use of elephant trunks for securing even distribution of concrete and the use of canvas for protection of forms from splashing of concrete, the contractor may devise some other method to accomplish the same results, subject to the approval of the Supervisor.

Article 7 of the contract contained the following provision with respect to inspection:

> (a) All material and workmanship (if not otherwise designated by the Specifications) shall be subject to inspection, examination, and test by the Supervisor, the State Engineer Inspector, and any other authorized representative of the Government, at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the same from the premises.

8. While the photograph referred to in the specifications quoted above was not with the specifications as furnished to plaintiff when it first considered bidding on the contract, upon request it was furnished prior to the time when plaintiff submitted its bid. The photograph furnished was 3¼ by 4½ inches, representing the area of a wall about 12 by 15 feet. The photograph was very indistinct and it was not possible to ascertain therefrom, with any certainty, what finish was desired. After receipt of the photograph, plaintiff was in doubt as to the character of finish desired by defendant and, being particularly interested in the amount of work to be done on the finished surface of the concrete, wrote a letter to the State Engineer making inquiry as to the amount of rubbing which would be required by defendant. Thereafter and before plaintiff submitted its bid on the contract, an addendum was issued by the defendant which contained the following sentence and which plaintiff considered a complete answer to its inquiry:

> The last sentence of the first paragraph calling for surface to be rubbed smooth, refers only to that portion of the surface where fins, feather-edges, or other rough spots have been removed.

9. Before pouring any concrete, plaintiff had a well recognized independent testing laboratory determine the proper proportions of sand and gravel within the specifica-

tions to be used on this job and after that mix had been set up, in conjunction with defendant's project engineer, plaintiff proceeded at once to pour some footings using that mix. On the same day, May 1, 1935, in the presence of defendant's representatives, plaintiff poured the first sample wall as provided in the specifications. The wall was seven feet high by ten feet long and new form lumber and plywood linings were used. Upon removal of forms, the wall showed sand streaks and air pockets, and the defendant's representatives refused to approve the wall as having the desired finish. The following day plaintiff poured a second wall using the same mix and following certain suggestions made by the defendant's representatives but the finish on this wall was similar to that of the first and it likewise was not approved by the defendant.

10. Plaintiff then suggested that it be permitted to pour one of the walls in A building with the thought that on a larger surface the result would be satisfactory but stated that in its opinion the sandy surface could not be eliminated without increasing the amount of cement in the concrete beyond that provided in the specifications. In furtherance of that suggestion plaintiff was permitted on May 13 and 14, 1935, to pour part of the foundation walls of A building using two different mixes both of which contained more cement than provided in the specifications. The texture or finish of these walls showed some improvement but the finish was still unsatisfactory to the defendant's representatives because of defects similar to those in the first two sample walls and they refused to approve the walls as a sample for further work. At the request of plaintiff, one of the defendant's architects came to the site of the work and examined the sample walls. The architect stated that he had designed the concrete to be like that in the barracks at Fort Benning, Georgia, which was the wall of the photograph, and requested plaintiff's representatives to examine the walls in that building. Shortly thereafter the architect, the project engineer, and plaintiff's representatives examined the walls of the barracks at Fort Benning, Georgia. Upon examination they found that the walls of the barracks had been painted and therefore it was not possible to make an exact comparison

with the sample walls which had been poured, but plaintiff's representatives contended that the walls which had been poured were at least equal in finish to those shown in the barracks at Fort Benning. The architect stated he did not expect to eliminate all water and air pocket holes and that he had been under the impression that the concrete at Fort Benning had a better surface than it actually had. The architect suggested further that plaintiff proceed to pour concrete guaranteeing that the walls would be the equal of samples previously poured and that further experimentation be made with a variation in the mix. Plaintiff thereafter poured five additional sample walls varying in mix, following recommendations made by the defendant's representatives, including suggested additional spading and making other changes, but little improvement was shown in the finish except in instances where the cement content was increased, in which cases the sandy texture was less apparent. The defendant refused to approve any of these five samples. One of the walls had been built under the personal supervision of the defendant's expert.

11. May 30, 1935, plaintiff advised the architects that after the pouring of further sample walls which did not show substantial improvement over the first walls, it was of the opinion that it could not produce the results desired by the defendant within the mix set out in the specifications and suggested that better results could be obtained by increasing the cement beyond that provided in the specifications, or by continuing with the mix previously used and grouting the entire surface, but that either method would increase plaintiff's cost and require a change order and increased compensation. Grouting consisted of brushing wet cement onto the wall, then troweling it so as to force it into any depressions, such as air or water holes, then cutting it off with the edge of a trowel, and rubbing the surface with burlap, leaving only that part of the cement which had been forced into the holes. The rest of it fell and was wasted.

The architects then requested plaintiff to prepare an estimate of the increased cost of grouting the walls, which plaintiff did, showing an extra cost of $11,240. The archi-

tects stated they would recommend that the defendant adopt that method and that plaintiff be paid the increased cost.

12. June 7, 1935, the architects advised the Director of the Inspection Division, Washington, that they were convinced the desired finish could not be obtained by using the mix provided in the specifications and recommended that the grouting method suggested by plaintiff be followed. They stated that in preparing the specifications they had used the walls of the barracks at Ford Benning as a guide, but upon a recent visit they had found that the walls had air and water pockets and were not so smooth as they had thought and that more cement had been used in the concrete for the barracks walls than was called for in the prison specifications.

They also said that they considered plaintiff's estimate of the grouting cost reasonable and recommended that action should be taken at once to avoid delay in the progress of the job. June 14, 1935, the Director of the Inspection Division, Washington, refused to accept the architects' recommendation that the walls be grouted and insisted that plaintiff be required to produce walls with a surface finish satisfactory to the Government without any additional cost to the defendant. At that time plaintiff had grouted one foundation wall and was permitted to pour some foundation walls and footings but was then advised by defendant's representatives that no more walls should be poured until a sample had been approved. June 18, 1935, one of the architects again came to the job at plaintiff's request and after an examination of various walls which had been poured he had certain treatment applied to a portion of the south wall of C building by having the fins rubbed off and then having the air and water pockets over 3/8″ in diameter filled with concrete. There were relatively few holes of this size. After having that work done, the architect asked plaintiff's president whether he would be willing to go to that extent in treating the walls without any additional charge. Plaintiff's president stated that the request was reasonable and that he would comply with it. The architect then approved that portion of C wall as the

sample wall designated in the specifications and by letter dated June 19, 1935, advised the Director of the Inspection Division, Washington, of such approval. This wall contained more cement than was provided for in the specifications. Plaintiff then proceeded to pour walls for a few days until stopped by the defendant.

13. June 22, 1935, plainiff's representatives advised the Director of the Inspection Division at Washington that they were pouring walls like the sample approved by the architect which walls contained more cement than that specified, concluding the letter with the statement—

> We think that we are entitled to reimbursement for the increased cost and will present this matter to you later for your consideration.

14. June 24, 1935, the Director of the Inspection Division advised the architects that the approved sample was not satisfactory, that it contained more cement than specified for which defendant would not reimburse plaintiff, and by letter of June 29, 1935, advised plaintiff in part as follows:

> We neither expect nor desire you to change the cement ratio in the concrete and do not approve of your doing so. The Government will allow no extra for the alleged extra cement claimed to be used.

15. June 29, 1935, plaintiff advised the Director of the Inspection Division that it would be ready to pour the first floor walls the first of the following week and urged immediate action upon the approval of a sample wall. Shortly thereafter a representative of defendant from Washington visited the job and plaintiff was permitted to pour concrete walls intermittently for a short while. Among the walls poured during that time was the south foundation wall of A building. This wall contained more cement than that set out in the specifications and the surface of the wall was fully grouted and rubbed after the forms had been removed. July 24, 1935, the Director of the Inspection Division advised plaintiff as follows:

> The exterior concrete surface of the south wall of building A between the ground line and the level of the first floor as now finished is acceptable to the gov-

ernment as fulfilling the requirements of the specifications in regard to finish of concrete surfaces and this wall shall be used as the approved sample wall with the understanding that it shall not involve any change in contract price stop Please signify your acceptance of this decision by wire and proceed accordingly with the understanding that the government does not waive any of its rights under the contract which shall remain in full force and effect in all particulars.

On the same day plaintiff advised the Director of the Inspection Division as follows:

> We accept decision finish concrete surfaces contained in telegram today

16. Plaintiff then proceeded to pour and grout walls in accordance with the telegram of July 24, 1935, referred to in the preceding finding, and continued such operations until about September 26, 1935. At or about that time a representative of plaintiff visited the job and found that more cement was being used than had been estimated and instructed plaintiff's superintendent to revert to the mix provided in the specifications. These instructions did not mean that grouting should be discontinued. Plaintiff's superintendent advised the defendant's project engineer of his intention to revert to the specification mix and the project engineer replied to plaintiff's superintendent on September 28, 1935, that as long as plaintiff stayed within the specifications and delivered a satisfactory surface, the defendant had no objection. Plaintiff then poured concrete with the specification mix for one day. The defendant's representatives were not satisfied with the walls produced and the project engineer advised plaintiff to improve the surface finish or the job would be closed down until a satisfactory surface was produced. Plaintiff then reverted to the mix which was used to construct the wall referred to in the defendant's telegram of July 24, 1935, and continued to use that mix for the remainder of the exposed walls.

17. The additional cost to plaintiff of the cement used on the job over that which would have been required under the mix provided in the specifications, plus the cost of grouting the walls, was $20,967.24. Including overhead, profit, and

bond premium, the total cost of cement and grouting was $26,921.40, computed as follows:

Labor of grouting	$15,079.86
Workmen's Compensation and Public Liability Insurance	831.10
Social Security Tax	94.42
Additional cement	4,961.86
Total	20,967.24
Job overhead, 10%	2,096.72
Main office overhead and profit, 15%	3,459.59
Bond premium, 1½%	397.85
Total	26,921.40

In addition, plaintiff incurred some increased cost for cleaning the buildings, which cleaning was made necessary only because of the grouting which was required, but the record is not sufficient to segregate this cost from other necessary expenses of removing rubbish and cleaning the buildings.

18. While the question of the approval of the sample wall was pending, plaintiff was unable to proceed with the work expeditiously and according to its plan. The pouring of concrete was for the most part limited to the pouring of footings and foundation walls, and in carrying on this work it was necessary to move operations from place to place. This disrupted the planned sequence of the work and the plan of operation, and delayed concrete work and other work depending upon it. Plaintiff had planned to erect the A and B buildings first, then move to the F and G buildings where the same forms could be used, and then go to the C and E buildings where the forms could be used with some remodeling, and to proceed in the meantime with the D and H buildings using special forms. Because of the delay in the approval of sample walls, plaintiff could not follow this plan but was compelled to move about to places where unexposed walls could be poured. This delayed progress of work, decreased production, and increased the cost of the work.

19. One of the difficulties encountered by plaintiff in carrying out this contract related to the submission and approval of shop drawings for various parts of the work. The general design of the project was shown by the drawings at-

tached to and made a part of the contract, but in many instances before proceeding with a given part of the work the contract required that plaintiff prepare and submit for approval shop drawings which would show exact dimensions, locations, or some other requisite features. The concrete for the buildings contained reinforcing steel, and approved shop drawings for the steel were required before the concrete could be poured. Hollow metal door bucks and steel window sash were to be set in the concrete and had to be on the job before that portion of the walls could be poured. Shop drawings were required in connection with the installation of this material. Shop drawings were also required in connection with many other items of material and equipment, including items of power-plant equipment, plumbing, and heating.

20. Article 5 of the General Conditions of the contract contained the following provision:

ARTICLE 5. *Shop or Setting Drawings and Schedules.* The Contractor will submit, with such promptness as to cause no delay in the work of the Contractor or in that of any other contractor or any subcontractor, to the Architects four copies of all shop or setting drawings and schedules required for the work of the various trades; the Architects shall pass upon said drawings and schedules with reasonable promptness. The Contractor will make any corrections therein required by the Architects (or the Supervisor, as hereinafter provided), will file with the Architects four corrected copies and will furnish such other copies as may be needed. Approval by the Architects of such drawings or schedules shall not relieve the Contractor from responsibility for (a) errors of any sort in shop or setting drawings or schedules; nor for (b) deviations from Drawings or Specifications unless the Contractor at the time of submission has notified the Architects, in writing, of any such deviations. Prior to final approval by the Architects, all such shop or setting drawings and schedules shall be submitted for correction by or approval of the Supervisor. When the same shall have been finally approved by the Architects and the Supervisor, the Supervisor shall retain one copy thereof, shall deliver one copy to the Architects and the remainder to the Contractor. All such copies shall bear the approval of the Architects and the Supervisor.

In addition, similar provisions were contained in the specifications with respect to the submission of shop drawings on various specific phases of the work as well as the submission of samples of material and equipment under certain circumstances.

21. As shown in finding 6, shortly after the beginning of the work on the project the architects mentioned in the contract were relieved of their duties of giving final approval on various items mentioned in the contract and thereafter only made recommendations which were subject to final approval by the Inspection and Engineering Divisions in Washington, D. C. The defendant required that after approval by the architects such drawings should be sent to the Inspection and Engineering Divisions in Washington for final approval before plaintiff was permitted to proceed upon the basis of these drawings. In most instances, action by the architects was taken within a few days, whereas the time consumed thereafter in sending the drawings to Washington, securing approval of the proper authorities, which often included detailed correspondence extending over a long period, and returning the drawings to plaintiff or its subcontractors, was usually much longer, often extending to several weeks. In some instances this delay was occasioned by failure of the plaintiff or one of its subcontractors to act promptly, but in most instances the delay was due to the large amount of detail required by the defendant before giving approval to the drawings and the failure of the defendant's representatives to act promptly on the drawings. In some instances approval when finally given in Washington was only conditional. A similar situation existed with respect to the submission of samples, drawings for mechanical equipment, and other matters of a like nature over which the defendant undertook to exercise supervision from Washington rather than through the architects and supervisor. The changed method of dealing with drawings and samples, referred to in this finding and finding 19, delayed the plaintiff in the prosecution of its work and increased the cost of completing the project.

22. One of the drawings prepared by the defendant and forming a part of the contract provided for the grading

of an area known as the west recreation field, with that area graded in such a manner that the slope would be in general away from the buildings. About the time plaintiff began work on the project, it was found that some of the contours shown on the drawings were in error and that the elevation of the ground in most places was one or two feet higher than shown on the drawings. After the discovery of the error plaintiff, at the defendant's request, submitted an estimate of the cost of doing the additional excavation work which would be required on account of the error in the drawings. Plaintiff's proposal to do the additional excavation work was rejected, and the defendant deducted from the payments to be made to plaintiff under the contract the estimated cost of the grading shown on the original map.

As a result of this decision, no grading was done on the west recreation field until the project was nearly completed. Since the elevation of a part of this recreation field was higher than the elevation of the buildings, the general tendency of the surface water was to flow toward the buildings and into the tunnels under the buildings. More water flowed into the tunnels than would have occurred had the grading been done at the beginning of the contract as originally planned.

Shortly after the beginning of the work, plaintiff discovered that the elevations for a sewer line leading from the buildings to the river were erroneous and some controversy thereafter ensued as to how the error should be corrected. The correct elevations were not given plaintiff until near the completion of the project with the result that plaintiff did not construct the sewer line until the project was almost completed. Failure to have the sewer line constructed earlier contributed to the lack of proper drainage for the project.

The controversy with respect to the grading of the west recreation field and the elevation for the sewer line together with the results which flowed therefrom contributed to the delay in the ultimate completion of the project.

23. In October 1935, a controversy arose between plaintiff and the defendant over the type of couplings which were to be used in connection with the installation of steam pipes in

the pipe tunnels under the H building. These pipes had to be placed after the concrete walls and floors of the tunnels had been placed but before the first floor which formed the roof of the tunnel had been placed. Shortly after the work began, the defendant's representative notified plaintiff that under the specifications many of the pipes had to have flanged couplings, whereas plaintiff contended that the specifications required only sleeve couplings. As a result of the controversy, the defendant's representative stopped the installation of these pipes on October 24, 1935, and eliminated some of the work which had been done from the monthly estimates. Plaintiff protested the matter to the Inspection Division in Washington. December 2, 1935, the Inspection Division advised plaintiff that it would not be required to use the flanged couplings and plaintiff was then permitted to proceed with the work.

During the period from October 24, 1935, to December 2, 1935, while the question of flanged couplings was pending, plaintiff was unable to pour the concrete floors in the H building or do certain other work on top of those floors and the progress of the work on the H building, the wings of the D building, and work in connection with the installation of certain equipment was delayed. This controversy contributed to the delay in the ultimate completion of the project and increased plaintiff's costs.

24. Plaintiff entered into a subcontract with one W. C. Burns for the plumbing, heating, and mechanical work on the project for approximately $185,000. From about August 1935 until the completion of the project Burns and plaintiff were engaged in controversies with each other in regard to money which Burns alleged plaintiff owed him and other matters. Burns was most insistent on the correctness of his positions in these disputes and often proceeded in a manner which was calculated to force plaintiff to accede to his position without regard to whether such action was in the best interests of advancing the work on the project. These actions by Burns included failure to deliver material on the project as promptly as required, lack of sufficient men at times on the job, and the failure at times to proceed with the work in an expeditious manner. These controversies be-

tween plaintiff and Burns delayed plaintiff in the ultimate completion of its contract and increased its costs.

25. The specifications set out the character of paint to be used, how it should be applied, the portions of the buildings to be painted, the colors and number of coats of paint, and various other matters affecting the painting of the buildings. As heretofore shown in connection with the approval of sample walls and the construction of the concrete, the finish on the walls was generally not satisfactory after the removal of the forms without additional work being done on the walls and it accordingly became necessary, before the walls were acceptable to do patching, grouting, and grinding in order to remove the sand streaks, air bubbles, and other objectionable features. One result of this additional work was that the walls did not present an entirely uniform appearance as to texture. Because of an experience which plaintiff had had on a previous job with the painting of similar work, where that painting work was severely criticized, plaintiff anticipated a strict inspection of this job. Plaintiff accordingly decided to request an inspection of the walls before any paint was applied and have a sample wall approved after the application of the paint.

26. After a sample wall had been painted early in February 1936, plaintiff wrote the following letter to the defendant's architects:

> At the request of the Project Engineer we applied two coats of the lettuce green cement paint to the interior surface of one of the exterior walls as a sample.
>
> The two coats do not produce an entirely uniform appearance and before starting this work we would like to have an inspection of this sample as we wish to avoid any complaint in the future.
>
> We will appreciate your prompt advice on this matter as we expect to begin the painting of the interior surfaces within the next ten days.

The defendant's representative objected to the variations in color in the wall where fins had been rubbed off or patching had been done. However, plaintiff's representative suggested that when the paint and walls became thoroughly dry a presentable and acceptable appearance would be shown and that, in any event, the specifications were being followed

in the painting operations. When the defendant failed to approve the sample wall by March 10, 1936, plaintiff began the painting of the interior walls. As this paint disclosed a condition similar to that on the sample wall it was objected to by the defendant's representative, and pay for that work was eliminated from the monthly estimates for April 1936. Plaintiff stopped the painting of the interior walls on May 13, 1936, but the work was finally resumed shortly after June 2, 1936, when the defendant advised plaintiff as follows:

> Conditional approval is given to application of the Medusa Cement paint applied to the interior of the dormitory units, provided this paint proves acceptable upon the final inspection of the Government.
>
> Room A-102 in Dormitory A is not in an acceptable condition at this time, and if further drying eliminates the badly streaked walls, it will be included on the next estimate.

Similar difficulties were encountered by plaintiff in the application of the semi-gloss enamel where many applications of paint were required before a surface satisfactory to the defendant was obtained. Instances occurred where the walls were approved before painting, the paint was applied in accordance with the specifications, but since the result was not satisfactory to defendant further painting and repainting were required.

The unduly strict and at times arbitrary inspection employed by defendant's representatives in order to obtain results satisfactory to them delayed the painting operation and contributed to the delay in the ultimate completion of the project.

27. The contract contained the following provision with respect to the care of the work at the project:

> Until final acceptance of the Improvement by the Government, the Contractor will be fully responsible for any injury or damage to the work or to the Improvement, or to any part thereof, occasioned by any cause or causes whatsoever excepting solely acts of the Government or of the public enemy, and for the proper care and protection of all materials and work performed, and the Contractor will make good at his own

expense all injury or damage (except as aforesaid) before the completion of the Improvement and its final acceptance by the Government. Any extension of time granted to the Contractor pursuant to the provisions of this Contract shall not relieve him or his sureties or any of them from this responsibility or any other responsibility under this Contract.

The General conditions forming part of the contract contained a further provision reading as follows:

> ARTICLE 10. *Protection of Work and Property.* The Contractor will continuously and adequately protect the Improvement, or so much thereof as has at any time been constructed, against damage and will protect all materials and supplies, whether or not incorporated in the Improvement, against damage from any cause and will make good all such damage unless it be due directly to errors in the Contract Documents or be caused by agents or employees of the Government. He will adequately protect adjacent property as provided by law and the Contract. He will provide and maintain all passageways, guard fences, lights and other facilities for protection required by public authority or local conditions.

Under the contract plaintiff gave a bond of over $500,000 conditioned upon faithful performance. The defendant also retained 10 percent of each monthly estimate until after the final acceptance of the job.

Shortly after the work on the project started and after some materials had been delivered and stored at the site of the work, the defendant's project engineer called upon plaintiff to furnish a watchman for service during the night periods and Saturdays and Sundays. Plaintiff's representatives protested orally on the ground that in their opinion the specifications did not require such an employee, and that in view of the location of the project in a country district and the character of material at the site, such care was not justified. The defendant's representatives, however, insisted upon the watchman being supplied. Plaintiff complied with their demand and took no written appeal from the decision of the project engineer.

The cost to plaintiff, exclusive of overhead, profit, and bond premium of providing watchman service for the

project, was $3,737.12 and, including those items, it amounted to $4,798.36.

28. The specifications contained the following provisions with respect to the material to be used in brickwork and tile partitions:

> *Common Brick* shall be hard burned, free from cracks, checks, or distortion and shall be of Standard size and of uniform dimensions and shall meet the latest specifications of the American Society for Testing Materials.
>
> * * * * *
>
> *Glazed Tile Block* shall be hard burned slip glazed, free from cracks, checks, distortion craze, dry spots, or chipped glaze and shall be "Perma-Chrome" color No. C9 as made by the Claycraft Company, Vitrilite-brick color No. 1500 as made by the National Fireproofing Corp., or Glazed Brick Tile color No. 520 as made by Stark Brick Co. Glazed tile blocks shall be 2″ x 5″ x 8″ and 4″ x 5″ x 8″ all glazed one side, and on ends as required, with cover base units, bull nose outside corner units, cove inside corner units, bull nose window sill, bull nose door jamb and head units with corners, cap and base units shall have return units at doors and windows as required. Window jambs will have square units. Where glazed brick does not extend for full height of door openings jamb units will be square. Where glazed brick does not extend for full height of wall the wall corners and angles will be square.

The specifications also contained the following further provisions as to how brick and tile work should be carried out:

COMMON BRICKWORK

> Form all openings for doors and build in windows as shown; provide wood centers and turn relieving arches over all openings where steel or concrete lintels are not used. Build neatly around all plumbing pipes, electric conduit, etc., where same comes in walls. Provide toothing for bonding hollow tile walls or glazed tile block walls with brick walls.
>
> * * * * *
>
> Lay all brickwork with ½″ joints, and slush up every course full. Walls shall be built level, plumb, square and true, with a continuous row of headers every sixth course and every start and finish course. Wherever

cement base is called for on Schedule of finishes, where brick walls occur, clip brick at start to form a ½″ recess to receive the cement base. Level up all walls wherever required for the ends of beams, lintels, etc. Before connecting new brickwork with brickwork previously set, sweep, clean and thoroughly wet old work. Bricks must be thoroughly wet before laying. No brickwork shall be laid in freezing weather unless by special permission of the Supervisor and any brickwork in which mortar has frozen shall be removed and rebuilt.

The joints on all exterior faces of exterior walls shall be down struck to form a weather joint. All joints within the buildings shall be up struck. Window sills shall have joints formed with a rounded pointing tool, joints rubbed hard. Top out brick parapet walls with vitreous clay copings.

* * * * *

Glazed Block Partitions, Wainscots, etc.

* * * * *

All glazed block partitions and wainscots shall start on a cement mortar leveling strip. This leveling strip shall be the full width of the block above and *Not* the full width of cove bases. Block shall be laid in all cases with ⅛″ vertical and horizontal joints in Puzzolan cement mortar. Carry block around all rooms, around all piers into window sills and jambs to face of steel sash, into door openings to back of trim.

All glazed block partitions, wainscoting, etc., shall be set plumb, straight, and true to exact lines. Partitions shall be built of 2″ thick blocks with brick filling or edge slushed full with mortar. At each third course of partitions use 4″ thick blocks and crimped galvanized iron ties to form a bond.

All horizontal joints must be kept level, vertical joints shall be broken, half blocks used as required and joints kept in line. Where block partitions join or intersect with walls they shall be securely bonded at alternate courses.

All joints shall be carefully struck and finished with a pointing tool to a hard polish.

The outside walls of the H building where the brickwork was done were 8-inch walls and every sixth course was a header course where the bricks were laid crosswise of the wall and extended from one face of the wall to the other.

The defendant's inspectors interpreted the specifications to require more than an ordinary common brick job and in accordance with such interpretation required that the header course be laid with brick of approximately the same length in order to present an even appearance in that course of brickwork. Since all common brick is not of the same length, the requirement of defendant's inspectors that brick of approximately the same length be used in the header course made it necessary that the brick be selected for that course instead of using the brick as they came. The result of this requirement on the part of the defendant's inspectors increased the cost of the brickwork over what it would have incurred had no such selection been required.

The defendant's inspectors also were more critical of chipped brick than is usual on a common brickwork job and interpreted the specifications to require that bricks which had been chipped to any appreciable extent should be rejected.

The defendant's inspection of the glazed brickwork was equally strict and in many instances plaintiff was required to perform the work with a higher degree of accuracy with respect to the location of joints and in other ways than it had contemplated and is often accepted in construction of that character.

While plaintiff's costs for the brickwork were higher than it had contemplated, it has not been proved that the defendant's representatives exacted of it any requirement which was not within the detailed specifications. No written appeal was taken by plaintiff from the decisions of the defendant's representatives.

29. Article 15 of the General Conditions provided as follows:

> *Applications for Payments.*—The Contractor will submit to the Supervisor and to the Project Auditor each application for payment not less than fourteen days prior to the date on which such payment is requested to be made. With each such application the Contractor will deliver to the Supervisor and to the Project Auditor, one copy to each, a written voucher in form satisfactory to them, showing in detail all work performed, labor employed, all materials, supplies and equipment furnished and all indebtedness incurred in connection with

> the construction of the Improvement during the period for which such application is made, and showing the cost of such work, labor, materials, supplies and equipment, and if required, the Contractor will submit likewise, receipts or other vouchers, duly sworn to, showing any expenditures or payments for materials and labor.

After the contract was signed, plaintiff submitted to the defendant a breakdown of the contract price and after two or three revisions it was approved by J. Houston Johnston, State Engineer P. W. A. However, after work had started on the contract, the State Engineer ceased to function and his administrative duties in connection with estimates and monthly payments were taken over by the Inspection Division in Washington, D. C. Thereafter, the Inspection Division required plaintiff to submit a new and much more elaborate breakdown of the contract. The Inspection Division also required unusually elaborate estimates for monthly payments and that eleven copies of such estimates be furnished.

Because of the great amount of detail required in the preparation of the monthly estimates, plaintiff sent men from its main office in Louisville, Kentucky, to the job in Georgia to assist in preparing such monthly estimates. The cost of travel from Louisville, Kentucky, to Georgia of plaintiff's employees to prepare the monthly estimates was $1,007.80. While much more detail was required of plaintiff in the preparation of its monthly estimates and in the preparation of the break-down of the contract than is ordinarily required in many contract operations, it has not been proved that in this regard anything was required of plaintiff which was not authorized by the general conditions and detailed specifications of the contract.

30. During the early period of operations, plaintiff prepared progress schedules showing its estimate of the completion date for the entire contract as May 1, 1936, that is, approximately fifteen months from the date when it actually began operations on January 24, 1935. The completion date provided in the contract was July 12, 1936. The work was finally completed December 31, 1936. Defendant, by three change orders, extended the completion date from July 12, 1936, to December 31, 1936, and no liqui-

dated damages were assessed against plaintiff for failure to complete the contract within the time originally specified therein. These change orders were as follows:

(a) The first change order dated April 30, 1936, covered the relocation of the sewer line and allowed plaintiff $3,025 for doing that work. In accepting plaintiff's offer to do the work for the amount allowed and adding that much to the contract price, the change order was made subject to various conditions, one of which read as follows:

> 5. The construction period named in the construction contract is to be extended by reason of this revision *45* calendar days to run concurrently with any other time extensions which may be granted as a result of claims which have been or may hereafter be filed for such time extensions.

(b) Prior to the issuance of the second change order dated September 5, 1936, a change order had been issued which increased the amount authorized under the contract for the drilling and equipment of deep wells from $12,000 to $24,000. By the change order dated September 5, 1936, one deep well was eliminated and the amount authorized was reduced from $24,000 to $12,928, a reduction of $11,072. The change order concluded with the following statement:

> In consideration of the various unavoidable delays encountered in taking bids and awarding of subcontracts for the deep well and deep well pump, an extension of contract time in the amount of 60 calendar days, in addition to any such extension previously granted, is hereby authorized with the distinct understanding and agreement that this extension expressly satisfies all claims and requests for time extension, of whatever nature or purpose, which have been received by the Administration up to and including this date.

(c) The third change order was dated January 6, 1937, and provided for an increase of the entire contract price in the amount of $2,760 to cover the cost of labor and materials in the construction of certain water softening equipment on the property. In addition, the change order provided for a further extension of the contract sixty-seven days, that is,

until December 31, 1936, and concluded with the following statement:

> This additional work will increase your contract amount in the sum of Two Thousand Seven Hundred and Sixty Dollars and No Cents ($2,760.00) and this increase shall be subject to the contract stipulations and covenants and shall be without prejudice to any and all rights of the United States, under the contract and bond.
>
> In consideration of the above-mentioned work and delays caused by the Government, this Change Order shall extend the contract completion date to and including December 31, 1936.

The additional time required to perform the work covered by the above change orders was much less than the extensions of time allowed by the change orders, the excess time having been granted by the defendant at least in part in consideration of delays otherwise caused by the defendant in the carrying out of plaintiff's work under the contract. Plaintiff accepted the change orders and carried out the work provided thereby without protest or appeal.

31. As hereinbefore shown, plaintiff was delayed in various ways in carrying out its contract. Instead of completing the contract as planned by May 1, 1936, or by the completion date specified in the contract, July 12, 1936, the contract was not completed until December 31, 1936. A part of the delay was attributable to acts of plaintiff and its subcontractor, Burns, and a part to acts of the defendant. The amount of the delay in the ultimate completion of the project reasonably attributable to the defendant was four months, and the increase in plaintiff's costs reasonably attributable to such delay and falling within the classification of Item E of the release set out hereinafter in finding 33 was $16,317.98 allocated as follows:

Rental value of equipment	$8,552.91
Cleaning buildings	2,535.33
Builder's risk insurance	209.01
Job overhead	[1]3,567.32
Main office overhead	1,453.41
	16,317.98

[1] This item represents plaintiff's job overhead attributable to this contract during the period of delay, minus the amount allowed for job overhead in connection with the claim for cement in finding 17.

Plaintiff also claims the sum of $9,798.08 for main office overhead during this period. This amount was arrived at by plaintiff and by the Commissioner of this court by determining the relation between total overhead and total collections for 1936 and applying the resulting figure to the collections on this job for 1936. The result reached was divided by 12 to obtain the monthly overhead attributable to this job and multiplied by 4 to arrive at the overhead during the period of delay.

Because of the limitation on its total recovery for delay under the terms of the release set out in finding 33, plaintiff's recovery on this item is limited to $1,453.41, the amount remaining under the release after the allowance of the other items in this claim.

32. As shown in finding 27, plaintiff claims that it is entitled to recover the cost of furnishing watchmen, $4,798.36. That cost for a four-month period amounted to $583.51.

33. On May 12, 1937, and in accordance with Article 17 (c) of the contract, plaintiff executed a release to the defendant which, among other things, provided:

> B. That the undersigned hereby acknowledges receipt from the United States of America of all sums payable to the undersigned by the United States of America under or pursuant to the above-mentioned Contract with the following exceptions:

1. Final estimate and retained percentage on Contract 714-C (Ga.) adjusted to include change orders Nos. 1 to 40, inclusive		$61, 941. 90
2. Claims:		
A. Extra cement used and grouting of exposed concrete surfaces	$39, 276. 12	
B. Drilling temporary well for construction-water purposes	761. 20	
C. Lamps furnished for third and fourth-floor cell blocks	16. 65	
D. Claim for premiums paid for fire and tornado insurance	2, 985. 07	
E. Job overhead and other costs from July 12, 1936, to December 31, 1936	16, 317. 98	
F. Watchman service	4, 769. 42	
G. Change in administration of project	7, 459. 26	
H. Change in kind of brickwork	6, 792. 77	
		78, 378. 47
Total		140, 320. 37

The undersigned further certifies and acknowledges that the United States of America has duly performed and fulfilled all the terms, provisions, and conditions on the part of the United States of America to be performed or fulfilled under or pursuant to said Contract, with the exceptions as noted above.

C. That the undersigned, except as regards items listed in paragraph "B," in consideration of the sum of $1.00 paid to the undersigned, receipt whereof is hereby acknowledged, does hereby remise, release and forever discharge the United States of America of and from all and all manner of actions and causes of actions, suits, debts, dues, accounts, bonds, covenants, agreements, judgments, claims and demands, whatsoever at law or in equity, which, against the United States of America, the undersigned, its successors, assigns and personal representatives, ever had, now have, or hereafter can, shall or may have, for or by reason of any cause, manner or thing whatsoever from the beginning of the world to the date hereof arising and/or by virtue of the above-mentioned Contract between the undersigned and the United States of America.

34. At the time of the execution of the release referred to in the preceding finding, plaintiff had filed various claims on account of excepted items which had not been finally acted upon. September 21, 1937, plaintiff was advised of action on the claims by the Federal Emergency Administration of Public Works as follows:

This will acknowledge receipt of your letter of August 9, 1937.

After careful consideration of the additional information developed at the Oral Hearing given you on August 4, 1937, together with the statements contained in your letter of August 25, 1937, in reference to the accuracy of the record of said hearing, I wish to advise as Contracting Officer that the additional information presented does not alter the decision contained in my letter to you dated June 23, 1937. The several claims, therefore, remain disapproved.

I am, however, recommending that the matter be referred to the General Accounting Office for its review and disposition.

Plaintiff has never been advised of any action by the General Accounting Office on its claims and the claims have not been paid.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff was the successful bidder for the construction, under a contract with the defendant, acting through the Federal Emergency Administration of Public Works, of a state prison in Tattnall County, Georgia. The contract was dated January 12, 1935, and was originally to have been completed by July 12, 1936. The time was extended by the defendant to December 31, 1936, the date of actual completion of the contract, and plaintiff was paid the contract price. Plaintiff claims that it was required to expend additional amounts for material and labor, and was delayed and otherwise damaged by acts of the defendant during the performance of the contract.

Plaintiff's first claim is with regard to the concrete walls of the prison buildings. The contract contemplated that the walls of seven of the eight buildings should be of "architectural concrete," that is, that the concrete walls as they stood after the removal of the forms in which the concrete was poured, should, with some touching up of particular spots, be the finished walls of the building, without being covered with plaster or faced with brick or stone. The contract specified the "mix" which should be used in pouring these walls. It was to be one part of cement, two and one-half parts of sand, and four parts of gravel or stone, with the privilege in the defendant of varying the proportions of sand and gravel for the purpose of obtaining a denser or more workable mix when thought necessary by the defendant's superintendent. A small photograph of a piece of concrete wall was furnished with the specifications, and it was specified that the finished wall should have a finish equal to that shown in the photograph. The contract required that plaintiff should build a sample wall, seven by ten feet, which, if approved by the defendant should be the standard according to which the permanent walls should be built.

On May 1, 1935, plaintiff poured a sample wall. It used for forms new plyboard of a type authorized by the con-

tract. When the forms were removed, the wall showed sand streaks where sand, not incorporated in cement, had come to the surface. It also showed small air and water pockets where bubbles of air or drops of water lying next to the forms had prevented the concrete from flattening out against the forms. The defendant's representatives refused to approve the sample. Another sample wall was poured the next day. The concrete was spaded more to bring it into contact with the forms and to let the air out, as suggested by the defendant's representatives, but this sample had the same defects and was disapproved. There was correspondence and consultation about what to do. The architect suggested that plaintiff examine the walls of the barracks at Fort Benning, Georgia, which the architect had intended as the standard for the Tattnall job, and plaintiff, the architect, and the project engineer went to Fort Benning to examine the barracks walls. They discovered, according to the architect, that the walls of the barracks were not as smooth as the architect had supposed they were; that more cement had been used in those walls than was specified for the Tattnall work; and that those walls had been painted before the photograph which was attached to plaintiff's contract was taken.

Plaintiff poured more sample walls, varying the proportions of sand and gravel and following various recommendations of the defendant's agents, but the defendant refused to approve any of the samples. On June 18, 1935, the architect asked plaintiff if it would be willing, without additional compensation, to point up all holes exceeding 3/8 of an inch in diameter in a section of wall which plaintiff had poured. Plaintiff said it would, and did so, whereupon the architect approved that wall as a sample. The defendant's representatives from the Inspection Division, however, overruled that approval. Plaintiff advised the defendant that the kind of wall it insisted on could not be made except by using more cement in the mix than was specified, and then doing a "full grouting" job on the wall after the forms were removed. The grouting job suggested consisted of brushing pure or "neat" wet cement onto the entire surface of the wall after the removal of the forms, troweling it so

as to force it into the depressions in the wall, and, after it had partially set, scraping the wall with the edge of a trowel to remove all of this cement except what was in the depressions; then rubbing the wall with burlap to take off any excess cement not scraped off with the trowel. Plaintiff told the defendant that for the additional cement in the mix and the cement and labor used in grouting, plaintiff should receive additional compensation to be authorized by a change order.

The defendant curtly advised plaintiff that it did not desire the use of additional cement, nor grouting; that it desired only that plaintiff build satisfactory walls. A section of wall was then poured under the personal supervision of an inspector sent by the defendant from Washington. It, too, turned out to be unsatisfactory.

The first sample wall had been poured May 1, 1935. It was now July. Plaintiff had planned to start on the A and B buildings and complete the concrete work on them from foundation to roof and then transfer its equipment and forms to the F and G buildings, which were identical with the A and B buildings, and pour those. Instead it had been obliged to shift about from one place to another pouring foundations, footings, and other unexposed concrete not involved in the wall controversy.

Plaintiff poured a section of wall on the rear of the A building. It used a mixture of concrete containing more cement than the specifications called for and also did a full grouting job on this section. This wall was inspected by a representative of the defendant from Washington, and on July 24, 1935, plaintiff received from the director of the Inspection Division in Washington the telegram quoted in finding 15. Plaintiff replied as follows: "We accept decision finish concrete surfaces contained in telegram today"; and confirmed the reply by letter.

Plaintiff thereafter built the exposed walls in conformity with the approved sample, i. e., using the rich mix and doing a full grouting job, except in one instance. In September, one of plaintiff's executives from Louisville visited the job. He found that the rich mix was using more cement than

he had anticipated, and directed the superintendent to revert to the mix specified in the contract. One section of wall was poured accordingly, but the project engineer warned plaintiff that the wall was not satisfactory and plaintiff used the rich mix thereafter.

For the richer mix and the grouting, neither of which plaintiff originally contracted for, plaintiff used more cement, and spent more for labor than performance of its original contract would have required. It claims compensation for these extras. The defendant urges that the exchange of telegrams on July 24 bound plaintiff to supply this additional labor and material without additional compensation. Plaintiff replies (1) that it did not by its telegram of July 24 or its letter of the same date, promise that it would do the work without additional compensation; (2) that if it did so promise, its promise was without consideration and was the result of coercion.

We see no merit in plaintiff's first point. The defendant's telegram plainly conditioned its approval of the sample wall upon plaintiff's agreement to furnish the additional labor and materials without additional compensation. Plaintiff could not have replied as it did to this telegram without intending to convey to the defendant the meaning that it was so agreeing.

As to whether there was legal consideration, we conclude that the cement and labor in controversy were additions to what was originally agreed to and not mere modifications to make up for a lack of skill or diligence or both on plaintiff's part. The law seems to be that if plaintiff had promised as it did in its telegram of July 24, and had then refused to perform that promise, it could have successfully defended a suit for breach of contract on the ground of a want of consideration. See Restatement of Contracts, sec. 75. But if one promises without consideration, and then performs his promise, he would seem to be in no better position, so far as securing compensation for his performance, than one who makes a gift of goods or services, the donee not expecting to pay and the donor not expecting to receive payment. However, in view of our conclusion

that plaintiff's promise to forego additional compensation was invalid for another reason, we do not decide the question of consideration.

As to whether plaintiff was coerced into agreeing to furnish the defendant some $25,000 in materials and labor without compensation, we have concluded that it was, and that its having, in form, agreed to do so, does not destroy the right which it would otherwise have had under article 4 of the contract, to extra pay for extra labor and materials furnished at the defendant's request.

Coercion sufficient to avoid a contract need not, of course, consist of physical force or threats of it. Social or economic pressure illegally or immorally applied may be sufficient. Restatement of Contracts, sec. 492, comment *g*. See *Hartsville Oil Mill* v. *United States*, 271 U. S. 43; *Hazelhurst Oil Mill Co.* v. *United States*, 70 C. Cls. 335.

A threat made in good faith, to enforce rights which one honestly believes that he has, is not legal coercion, even though those rights are in fact or in law nonexistent. But if one knows that he has not the right which he insists upon, and still by the pressure of his insistence causes another to yield up his rights in order to escape the pressure, that is coercion.

In this case, the specifications were plain as to the amount of cement to be put into the walls. The photograph was by no means plain. The architect, who had in his mind a particular kind of wall, conceded after an examination of the photographed wall that it was not like the wall he had in his mind, and that the wall had been painted before it was photographed, which changed its appearance, and that it had more cement in it than was specified in plaintiff's contract. In the circumstances, the photograph added substantially nothing to the words of the specifications. And the only reasonable construction of those words was that plaintiff promised to make as good a wall as good workmanship could produce from the specified materials. By the time of plaintiff's July 24 telegram, it had been demonstrated beyond question that what the defendant was insisting on was not what the specifications called for. The fault was not in the workmanship. The defendant's architect and inspectors had been present

when the sample walls were poured. Their suggestions had been made and followed. One section had been built under the personal supervision of an expert of the defendant who had in effect used plaintiff's workmen and materials to do the job for him. Yet he or his superiors would not approve the result. On June 19 the architect approved a sample wall which, while containing extra cement, was not fully grouted but only pointed. Plaintiff requested extra compensation for the extra cement. The defendant overruled the architect, disapproved the wall and said "We neither expect nor desire you to change the cement ratio in the concrete and do not approve of your doing so. The Government will allow no extra for the alleged extra cement claimed to be used." Yet on July 24, the defendant approved a sample wall which it knew contained extra cement and had been fully grouted, but in giving its approval stipulated for no extra compensation.

It is difficult to apply terms with moral implications, such as "good faith," to impersonal legal entities such as corporations or governments, especially in situations where they act on one matter through a number of agents. Some of the moral qualities may be lost or diluted as the decision passes from one agent to another. But the test of good faith should be the same for an entity which must act through agents as for an individual acting for himself. If the aggregate of the actions of all of the agents would, if all done by one individual, fall below the standard of good faith, the entity for whom the various agents acted should be held to have violated that standard. It is the responsibility of the entity, the principal, to so coordinate the work of its agents that the aggregate of their actions will conform to required legal standards.

Here the Director of the defendant's Inspection Division and his staff in Washington and in the field continued to demand of plaintiff a performance which was impossible after repeated demonstrations which should have convinced them that it was impossible if they had looked at the problem reasonably. They should have been aware that plaintiff's plans were being disrupted by the delay; that its overhead was being increased; that its contract time was run-

ning, and, if it should run out before the completion of the contract, plaintiff would be subject to the risk of paying liquidated damages at $250.00 per day; that cancellation of plaintiff's contract for inability or refusal to perform would cause confusion and loss which plaintiff would, with reason, go far to avoid.

These being the circumstances, the defendant's agents were careful to refrain from requesting in so many words that plaintiff put in extra cement or do extra labor, lest such a request might have given plaintiff a valid claim for extra compensation. Yet, after having repeatedly refused to approve a sample wall built according to the specifications, they approved a sample which they knew contained extra cement and extra labor, conditioning their approval upon plaintiff's agreement to forego any claim to be paid extra compensation. This conduct was in fact oppressive. The care which was taken not to appear to ask for more than was due under the contract while in fact insisting on more seems to us, in the circumstances here present, to show that it was designedly oppressive. We think that it fell below the standard of good faith, that plaintiff's agreement not to claim additional compensation should be disregarded, and that its claim should be considered on its merits.

It follows from what we have said that plaintiff may recover for the cement and labor used in excess of what would have been necessary to build the walls according to the specifications. There is no dispute as to the cost of the labor for the grouting job and the items of incidental expense relating thereto as shown in finding 17. As to the amount of extra cement used, the parties disagree. Plaintiff gave evidence of the entire amount of cement brought to the job, the amount used for other purposes than concrete work, and the amount which, according to computations based on cubic footage and the cement content called for by the plans and specifications, it would have used if it had been permitted to use the specified mix. It then subtracted the latter two amounts from the total and presented the result, 16,247 sacks, as the amount of extra cement, beyond the specifications, which it was compelled to use. This computation made allowance for normal wastage.

The defendant presents a computation made from plaintiff's "pour book," an actual record made at the time the walls were poured of the amount of cement that went into each mix. From this amount is deducted the amount which would have gone in if the leaner mixture called for by the specifications had been used. The excess, according to this computation, is 7,426 sacks of cement. It is probably true that this computation fails to include some extra cement that was used, not in the walls, but in other locations where a continuous pour was required to produce a monolithic structure extending into the walls, and where plaintiff was, for that reason, obliged to use the richer mix. In spite of this defect in the defendant's evidence, we have concluded that it is a safer guide than plaintiff's general and "over-all" computation which would impose on the defendant the cost of all extraordinary wastage or use of cement, as well as all risk of miscalculation of the cubic footage of the entire job. Plaintiff was aware, from the beginning, of the controversy about the cement and could have preserved more dependable and specific evidence than it offers here. Computed according to the defendant's method, the cost of the additional cement was $4,961.86. The total additional cost of cement and grouting, as set out in finding 17, was $26,921.40.

Plaintiff's second claim is for damages resulting from various delays caused by the defendant. The defendant does not deny that it delayed the completion of the project, but it argues that its delays ran concurrently with delays caused by plaintiff and its subcontractor and that in any event, plaintiff was compensated by three change orders which gave it additional pay and extended the time for performance.

We have found that the defendant in various ways unreasonably delayed the work. These include the delay in the approval of the sample wall (see finding 18); delay in approving and returning shop drawings and samples of materials (see finding 21); the discovery of an error in the elevations, delaying the grading of the west recreation field, and the laying of the sewer (see finding 22); the controversy over the type of couplings to be used in connection with the installation of steam pipes in the

tunnels under "H" building (see finding 23); and the strict and arbitrary painting inspection (see finding 24).

Plaintiff was delayed in the completion of the project and its costs were increased as a result of the conduct of one of its subcontractors, who, on several occasions, failed to have materials and labor at the site as needed. We have concluded, however, from a consideration of all the evidence, that, in addition to the delay caused by the subcontractor, the amount of delay reasonably attributable to the acts of the defendant amounted to four months.

The change orders did not, as the defendant urges, preclude plaintiff from seeking damages for delays caused by the defendant. The first change order, dated April 30, 1936, allowed plaintiff $3,025.00 for relocating the sewer line. The time was extended 45 days to "run concurrently with any other time extensions which may have been or may hereafter be filed for such time extensions." The second change order, dated September 5, 1936, replaced an earlier proposed change order which was to have increased the amount authorized under the contract for deep wells from $12,000.00 to $24,000.00. The September change order eliminated the construction of one deep well and reduced the amount authorized to $12,928.00. It concluded with the following statement:

> In consideration of the various unavoidable delays encountered in taking bids and awarding of subcontracts for the deep well and deep well pump, an extension of contract time in the amount of 60 calendar days, in addition to any such extension previously granted, is hereby authorized with the distinct understanding and agreement that this extension expressly satisfies all claims and requests for time extension, of whatever nature or purpose, which have been received by the Administration up to and including this date.

The third change order was dated January 6, 1937, and provided for an increase of $2,760.00 to cover the cost of labor and material in the construction of water-softening equipment and an extension of time of 67 days, making the date of completion December 31, 1937.

These change orders were not intended to include any compensation for damages suffered by plaintiff as a result

of delays. As to the second one, which reduced plaintiff's compensation in exact proportion to the reduction in the work to be done under the contract, that is plain beyond question. As to the two others, the small sum allowed plaintiff could not have included, in addition to pay for the extra work and materials, compensation for the long delays recognized by the extensions of time of 45 and 67 days, respectively.

On May 12, 1937, plaintiff executed a release to the defendant, the terms of which are set out in finding 33. We think that $16,317.98, the amount saved by Item E of the release, entitled "Job overhead and other costs from July 12, 1936, to December 31, 1936," is the upper limit of what plaintiff can recover as damages for delay of a kind not specifically covered by other headings in the release. We have found the following amounts of such damages attributable to the four months delay caused by the defendant:

Job overhead	$3,567.32
Builder's risk insurance (4 months)	209.01
Cleaning buildings (4 months)	2,535.33
Rental value of equipment	8,552.91
	14,864.57

Subtracting the above total from the $16,317.98 saved in Item E of the release, leaves $1,453.41 to cover the claim for main office overhead. As to the main office overhead, the Commissioner of this court found that $9,798.08 was properly attributable to the delay on this job. This sum bears the same proportion to plaintiff's total overhead during the period of delay that plaintiff's collections on this job during the period bore to its total collections. The defendant objects to this method of computation, urging that there is no necessary relation between collections and activity on the job which would require activity at the main office. It appears, however, that the monthly payments made by the defendant to plaintiff on this job correlated closely with the current use of labor and materials on the job. Indeed, the substantial final payment made in May 1937, and therefore not included in the apportionment of overhead for the period of delay, the job having been completed in 1936, works to plaintiff's disadvantage under this method of computation.

We think therefore that the Commissioner's method of computation was sufficiently accurate.

In connection with its claim for compensation for the extra cement used, plaintiff claimed, and has been allowed, an item of main office overhead, based on a percentage of the cost. Because a part of the work involved in that claim was performed in 1936, there is a duplication, to some unascertained extent, in the two items of main office overhead. No satisfactory basis of segregation is shown in the record. Subtracting the amount allowed in the cement claim leaves $6,338.49 as the greatest amount that plaintiff could recover for main office overhead in connection with this claim.

The defendant also objects to the inclusion of some items of main office expenditure in the computation of overhead. We have no doubt as to the propriety of any of the items except donations and the cost of the Democratic Committee Year Book. As to these we do not decide since, even if they are excluded, the main office overhead item would amount to more than $1,453.41, the remaining margin which, as shown above, is all that may be recovered under the release.

We have allowed recovery for the rental value of machines detained on this job by reason of the delay caused by the defendant. We think there is adequate proof that plaintiff could have used the machines elsewhere, had it not been for the delay, and that plaintiff was damaged by reason of their unavailability.

Item F of the release is for "Watchman service" in the amount of $4,769.42. Plaintiff's claim for furnishing watchmen during the entire time of construction is hereinafter discussed and disallowed, but it is entitled to recover the cost of providing watchmen during the period of delay caused by the defendant. That cost was $583.51.

Item G of the release is entitled "Change in administration of Project." We think that this item refers to the increased costs which plaintiff claims resulted to it from the fact that the project was supervised from Washington, rather than locally. (See finding 6.) Although delay in the approval of shop drawings and materials was one of the incidents of that system of supervision, there is nothing in the evidence

to permit a determination of what part, if any, of the amount reserved in Item G is attributable to delay as distinguished from additional work and direct expense caused by the remote supervision. Plaintiff's recovery on its claim for damages for delay is therefore limited to $16,901.49, that being the sum of $16,317.98 reserved by Item E of the release, plus $583.51, the cost of watchmen during the period of delay, which is a part of what was reserved in Item F of the release.

Plaintiff's third claim has to do with alleged extra brickwork. The provisions of the specifications relating to this phase of the work appear in finding 28. The brickwork was to be done on the outside wall of the H building. Every sixth course of brick was what is known as a "header course," with the brick running through the wall. The defendant's inspectors required that the header course be laid with brick of approximately the same length so as to present an even surface on each side of the wall. Since all common brick is not uniform in length, the defendant's requirements made necessary a careful selection of brick for the header course. Plaintiff also claims that the defendant's inspectors were too strict in ordering the elimination of brick which had been chipped to any extent. These rulings made the cost to plaintiff of this part of the work greater than it had contemplated. We have concluded, somewhat doubtfully, that plaintiff has not proved that the defendant required more in regard to the brickwork than was called for in the specifications.

Plaintiff's fourth claim is for the cost of furnishing watchmen. Shortly after work on the project was started, the defendant's project engineer told plaintiff to keep a watchman on the premises at night and on Saturday and Sunday. Plaintiff protested that the specifications did not call for a watchman and that considering the isolated location of the project and the nature of the materials on the site, a watchman was not necessary. Upon insistence, however, plaintiff complied with the project engineer's instructions. The provisions of the contract relating to the care of the project are set out in finding 27. In view of these provisions, we have not found that the defendant's requirement

was beyond the fair scope of the contract. We have, however, as hereinbefore indicated, allowed plaintiff the cost of watchmen during the four months' period of delay.

Plaintiff's final claim is that it was required to do work not called for by the contract in the preparation of vouchers for monthly payments and that this put it to extra expense. The Inspection Division required plaintiff to furnish unusually elaborate estimates, but, considering the provisions of Article 15 of the General Conditions (see finding 29), we have not found that these requirements went beyond what was permissible under the contract.

Plaintiff is entitled to recover a total amount of $43,822.89. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CENTRAL POWER COMPANY v. THE UNITED STATES

[No. 44219. Decided May 4, 1942]

On the Proofs

Income tax; deduction of loss before loss is definitely determined.—Where plaintiff, a public utility company, in 1930 owned and operated a canal which was used in connection with its hydroelectric generating plant; and where in 1930 there occurred a flood which caused a break in said canal and an overflow resulting in damage to the adjacent tracks of a railroad company; and where it was established that such overflow was due to a defective condition of a certain diversion gate or spillway of said canal; and where after suit had been instituted against plaintiff in 1931 by said railroad for damages; and where settlement of said suit was effected by stipulation and agreement executed March 3, 1932; and where payment in full in accordance with said stipulation and agreement was made by plaintiff in the year 1932; it is *held* that plaintiff is not entitled to deduction from its income for either 1930 or 1931 for the amount of said settlement made and paid in 1932, and is accordingly not entitled to recover.

Same.—The general rule is that losses are to be taken when realized.

Same.—To permit a deduction for a contingent loss in a negligence case before the fact of negligence is definitely established, and therefore before there is any certainty of liability, would cause confusion in applying the principles of taxation.

The Reporter's statement of the case:

Mr. William L. Latimer for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Delaware corporation with its principal office and place of business in Grand Island, Nebraska. It is engaged in the business of manufacturing gas and electricity and the business of distributing gas, electricity, and water. It is a subsidiary of the Middle West Corporation, a Delaware corporation with its principal office in Chicago, Illinois.

2. April 9, 1931, plaintiff filed its completed Federal income tax return for the calendar year 1930, showing a tax due of $4,873.20 which, with certain interest, was paid by plaintiff as follows:

March 9, 1931	$900.00
April 9, 1931	320.94
June 13, 1931	1,218.30
September 14, 1931	1,218.30
December 8, 1931	1,218.28

Thereafter, the Commissioner of Internal Revenue, hereinafter referred to as the "Commissioner," determined a deficiency against plaintiff in the amount of $2,695.50 which, with interest of $621.74, was paid February 7, 1935.

3. August 25, 1932, plaintiff filed its completed Federal income tax return for the calendar year 1931, showing a tax due of $2,409.11 which, with interest of $23.06, was paid as follows:

August 25, 1932	$1,226.46
September 8, 1932	603.01
December 13, 1932	603.00

Thereafter, the Commissioner assessed a deficiency against plaintiff for 1931 of $3,481.20 which, with interest of $594.09,

was paid February 7, 1935. A further deficiency was assessed against plaintiff for 1931 of $2,700 which, with interest of $575.43, was paid October 18, 1935. No deduction was claimed in either the return for 1930 or 1931 on account of the item for flood damage hereinafter referred to, and no allowance was made by the Commissioner.

4. September 11, 1933, plaintiff filed its completed Federal income tax return for 1932, showing a loss of $70,504.53 and no tax due. In that return plaintiff claimed a deduction of $22,500 on account of an item for flood damage.

5. Throughout the year 1930 and for many years prior thereto, plaintiff owned and operated a canal in Nebraska which was used in connection with its operation of a hydroelectric generating plant. The canal was located near the right-of-way and tracks of the Union Pacific Railroad Company, hereinafter referred to as the "railroad." On or about June 3, 1930, a flood occurred which caused an overflow of and a break in the canal, and the waters, which were released, washed out approximately 2,000 feet of the tracks of the railroad and caused other damage to property in that locality. One of the principal causes of the damage was that a certain diversion gate or spillway in plaintiff's canal was not in operative condition and could not be opened to release the water at the time of the flood.

6. August 20, 1930, the railroad presented a claim against plaintiff on account of the damage sustained to its property of $63,940.73. Thereafter, conferences were held between representatives of plaintiff and the railroad and as a result thereof the railroad submitted a revised bill on December 23, 1930, in the amount of $60,383.60. In the letter of transmittal, the railroad stated that in order to avoid litigation it was willing to settle the claim, with the exception of three contingent and undetermined items in the amount of $14,-308.51, for one-half the remainder of $46,075.09, that is, $23,-037.54. This proposal was in conformity with a proposal made by the railroad at a conference in November 1930.

7. During May, July, and August 1931, conferences were held between the parties and correspondence passed between them with respect to the settlement of the claim. On May

25, 1931, the general attorney for the railway company addressed a letter to the president of the plaintiff company which contained the following statement:

> Since our conference on the 20th relative to above claim, I have gone over the matter very carefully with our engineers and have considered the contentions made by you, but I am still of the opinion that the Central Power Company is liable.

In the same month an offer was made by plaintiff's representative to pay $15,000 in full and complete settlement, and later in that month the offer was increased to $20,000. About July or August 1931, the railroad's representative offered to accept $25,000 in full settlement, but plaintiff's representative countered with the suggestion that he would not recommend a settlement in excess of $20,000, and no agreement was reached.

8. The controversy not having been settled, the railroad in September 1931 instituted suit against plaintiff, claiming damages in the amount of $57,828.96 together with costs and interest from June 3, 1930. No answer was filed by plaintiff to the petition, an extension or extensions having been granted without objection from the railroad.

9. Further efforts were made after the institution of the suit to effect a settlement, including a discussion in December 1931, of an offer by plaintiff's representatives of settlement on the basis of a payment by plaintiff of $22,500. Plaintiff, however, was not in the best financial condition at the time, particularly because of interest on bonds which was coming due at the end of that year, and asked that its proposal of settlement for $22,500 not be submitted to the appropriate authorities of the railroad until after the close of the year. The matter was not further considered by the railroad until the early part of February 1932. About that time whatever proposal had been made by plaintiff for settlement on the basis of $22,500 was further conditioned by plaintiff upon the railroad's extending a power contract with plaintiff for two years. February 13, 1932, the railroad advised plaintiff that it could not accept the proposal of settlement with the condition attached but would accept it without such an

agreement, concluding such letter with the following statement:

> Please advise me as soon as possible whether you are willing to settle on this basis, as we desire to try the case as soon as it can be reached, if it is not settled.

Plaintiff replied to that letter February 15, 1932, concluding its letter with the following statement:

> It is our feeling that the proposal which we have made is eminently fair and that we should not be expected to agree to settlement on a more lenient basis. We are, therefore, obliged to assume that it is your desire that the case come up for trial.

February 16, 1932, the railroad company answered plaintiff's letter of February 15, 1932, as follows:

> This will acknowledge receipt of your letter of the 15th relative to above case, from which I note that our efforts to reach a settlement with you have failed, and we will insist upon a trial of the case at the term of court which commences on April 18th.

10. Shortly after the events referred to in the preceding finding, plaintiff and the railroad reached an agreement which was reduced to writing in the form of a stipulation and executed by the parties about March 3, 1932, under which plaintiff agreed to pay and the railroad agreed to accept the sum of $22,500 in full settlement of all claims of the railroad against plaintiff growing out of the flood of June 1930, heretofore referred to. Plaintiff paid $7,500 of that amount at the time of the execution of the stipulation and the balance was covered by ten promissory notes, all of which were paid during 1932. The suit by the railroad against plaintiff was dismissed January 23, 1933.

11. Plaintiff kept its books and accounts and filed its income tax returns during the years 1930, 1931, and 1932 on an accrual basis, and followed the practice of not finally closing its books for any calendar year until after an audit by a firm of certified public accountants. The accountants completed their audit of plaintiff's books for the calendar year 1931 on March 21, 1932, and submitted their written report to plaintiff April 27, 1932. In setting up journal entries

for the closing of plaintiff's books as of December 31, 1931, the accountants had the following journal entry made in plaintiff's books:

Miscellaneous Deferred Debits	$22, 500. 00	
To Accounts Payable		$22, 500. 00

To set up liability for suit brought by Union Pacific Railroad Co. account of washout in 1930 settlement was made in March 1932 for $22,500.00.

As a result of the above antedated journal entry, plaintiff's books for the calendar year 1931 showed as a liability and as an account payable the sum of $22,500 with a corresponding debit or charge of the same amount to an account entitled "Miscellaneous Deferred Debits," and this journal entry was reflected in plaintiff's balance sheet for December 31, 1931, which was distributed in its annual report to its stockholders for 1931. This deferred debit ite mof $22,500 was later entered as a charge to plaintiff's surplus in the calendar year 1932.

12. March 14, 1934, plaintiff filed a claim for refund for 1931, in the amount of $2,409.03 and assigned as one of the grounds therefor that the net income shown in the return should be reduced by the allowance of a deduction for flood damage of $22,500. The Commissioner rejected that claim and advised plaintiff of such action by registered letter dated July 9, 1935.

13. December 7, 1935, plaintiff filed a claim for refund for 1930 in the amount of $3,585.15 and assigned as one of the grounds therefor that the net income shown in the return should be reduced by the allowance of a deduction for flood damage of $22,500. The Commissioner rejected that claim and notified plaintiff of such action by registered letter dated November 5, 1936.

14. December 10, 1935, plaintiff filed a second claim for refund for 1931 in the amount of $6,982.72 and assigned as one of the grounds therefor the claim for the allowance of a deduction from gross income of an item of $22,500 for flood damage. The Commissioner rejected that claim and advised the plaintiff of such action by registered letter dated November 5, 1936.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

For many years prior to and during the year 1930 plaintiff owned and operated a canal in Nebraska which was used in connection with its operation of a hydroelectric generating plant. The canal was located near the right-of-way and tracks of the Union Pacific Railway Company.

An unprecedented amount of rain fell in that area during the first few days of June 1930, the final precipitation measuring six or eight inches. The small creeks and dry creeks, otherwise flowing into the canal, overflowed, causing a break at one point in the canal. The flood waters washed out approximately 2,000 feet of the tracks of the railroad and caused other damage to property in that locality. A gate to the first wasteway in plaintiff's canal was not in operative condition and this apparently augmented the effect of the flood and contributed to the damage caused by the overflow.

On August 20, 1930, the railroad company presented a claim against plaintiff in the sum of $63,940.73 on account of damages to its properties. Conferences were held between representatives of plaintiff and defendant and various proposals and counter proposals of settlement were made over a considerable period.

In September 1931, the controversy not having been settled, the railroad company instituted suit. The negotiations continued and finally the matter was settled in early March 1932, for a total sum of $22,500, plaintiff paying to the railway company $7,500 in cash and executing ten notes for $1,500 each, all of which were paid in 1932.

On September 11, 1933, plaintiff filed its completed Federal income tax return for 1932 showing a loss of $70,504.53 and no tax due. In that return plaintiff claimed a deduction of $22,500 on account of flood damage.

Later plaintiff filed application for refund for the year 1930 claiming that its loss on account of flood damage occurred in 1930. Apparently for protection it also filed a claim for refund for the year 1931. Its books were kept on an accrual basis.

The question is whether plaintiff was entitled to a deduction for the claimed item, due to flood loss, in the computation of its Federal income taxes for the year 1930, or for the year 1931.

The general rule is that losses are to be taken when they are realized. There is an exception to this rule. The exception is clearly stated by the Supreme Court in *Lucas* v. *American Code Co.*, 280 U. S. 445, 449:

> Exception is made, however [to the general rule of realized losses or gains] in the case of losses which are so reasonably certain in fact and ascertainable in amount as to justify their deduction, in certain circumstances, before they are absolutely realized.

We do not think plaintiff was entitled to a deduction for either of the years 1930 or 1931.

The railway company sustained a loss in 1930 when the flood came, it being the owner of the property.

The plaintiff's loss did not become certain in fact or in amount during 1930 or 1931. Its loss, conditioned on liability to the railway company, was a contingent one based on a tort or alleged failure to keep the waste gate in operative condition. Negligence is a matter of affirmative proof. The excessive rainfall in the drainage area of the canal is a further complicating factor in the question of whether there was negligence and consequent liability. Apparently representatives of both plaintiff and the railway company regarded the evidence of negligence as rather strong but the various proposals of settlement show that it was not merely a question of ascertaining the amount of property loss, but that the fact, as well as the amount, of liability was still in the negotiation stage. Suit was filed late in 1931. Settlement was made in 1932. Not until then was either the fact or the amount of liability definitely established.

It is contended that the fact that no answer was filed by plaintiff to the suit of the railway company constituted an admission of negligence, thus fixing liability. The facts are to the contrary. There was an agreement for an extension of time within which to file answer pending continuation of efforts to settle the controversy. This is not unusual. Attorneys for plaintiff and defendant occupied adjoining offices. Plaintiff's attorney had said to counsel for the railway

company in October 1931, "If we have to try it [the lawsuit], why, I am ready to answer, but I don't want to try it, and I don't suppose you do, at this term. Now, will you agree with me that we can have sixty days additional in which to answer, and if we don't arrive at an agreement of some sort, why we will try it in the spring?" Practicing lawyers understand such courtesies. Their entire conversation as well as prior and subsequent correspondence contradict any such direct admission of negligence on the part of plaintiff as would fix liability. It may be added that the general attorney for the railway company in a letter dated May 25, 1931, to the president of the plaintiff company, had stated:

> Since our conference on the 20th relative to above claim, I have gone over the matter very carefully with our engineers and have considered the contentions made by you, but I am still of the opinion that the Central Power Company is liable.

This letter clearly indicates lack of agreement as to liability.

Nor were the identifiable facts sufficient to bring the case within the exception to the rule. No deduction on account of flood loss was claimed by plaintiff in making income tax returns in either 1930 or 1931. The letters dated February 13, 15, and 16, 1932, between representatives of plaintiff and the railroad company, quoted in Finding 9, show clearly that complete settlement had not been agreed upon as of those dates.

Plaintiff was given credit in 1932, the year in which both the liability and the amount became definitely fixed. While it was unfortunate for the plaintiff that this loss was realized in a year when other losses were incurred, the undisputed facts preclude any other finding. To permit a deduction for a contingent loss in a negligence case before the fact of liability is definitely established, and therefore before there is any certainty of liability, could but add confusion in applying the principles of taxation.

The petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JOHN F. L. O'LEARY v. THE UNITED STATES

[No. 44728. Decided May 4, 1942]

On the Proofs

Department of Justice expenses; approval of Attorney General.—Under the provisions of the Act of May 28, 1896, expenses for services rendered to the Department of Justice can be incurred only upon the approval of the Attorney General. *Vlachos* v. *United States*, 90 C. Cls. 165, cited.

The Reporter's statement of the case:

Mr. John F. L. O'Leary pro se.

Mr. Robert E. Mitchell, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Akin* was on the brief.

The court made special findings of fact as follows:

1. John F. L. O'Leary, plaintiff, is a resident of Milwaukee, Wisconsin, and has been a shorthand reporter for approximately the past ten years.

2. September 24, October 4, and November 13, 1935, hearings were held in the office of Milton J. Knoblock, Referee in Bankruptcy, at Racine, Wisconsin, on the petition in bankruptcy of one Joseph J. Kuczynski. The United States, a creditor of the bankrupt, was represented at the hearings by L. Hugo Keller, Assistant United States Attorney for the Eastern District of Wisconsin. T. G. Melvin, a Special Agent of the Federal Bureau of Investigation, Department of Justice, was also present.

Plaintiff appeared and reported the proceedings and furnished an original copy of a transcript thereof to the referee in bankruptcy and a carbon copy to United States Attorney Keller and Special Agent Melvin.

3. There is nothing in the record to show that a transcript of the testimony was ordered by the Referee, the Assistant United States Attorney, or the Special Agent. Neither Keller nor Melvin had any authority to contract on behalf of the United States for a copy of the transcript of the bankruptcy proceedings. Nor does the record show that plaintiff was engaged by anyone to report the bankruptcy proceedings but at the second hearing plaintiff handed the

original transcript of the first hearing to the Referee and copies to Keller and Melvin; and that Keller and Melvin, in conducting their examination of witnesses at the second and third hearings, made use of the transcripts of the previous proceedings given to them by plaintiff.

4. One hundred seventy-eight pages of testimony were typewritten by plaintiff which at fifty cents a page for the original and twenty cents a page for the copy amounts to a total of $124.80; and three days attendance was required which at 15.00 per diem amounts to $45.00, making plaintiff's total charge for this work $169.60. A bill for plaintiff's fees including the attendance fee of $15.00 was attached to the original transcript given to the referee and also accompanied the carbon copy delivered to the United States Attorney Keller.

The court decided that the plaintiff was not entitled to recover, in an opinion *per curiam* as follows:

This is a suit brought by John F. L. O'Leary, plaintiff, a shorthand reporter, to recover the sum of $169.60 alleged to have been due him for reporting hearings before a Referee in Bankruptcy at Racine, Wisconsin, and furnishing a copy of the transcript thereof to the Referee in Bankruptcy and to an Assistant United States Attorney.

The record shows that the plaintiff did perform work as a reporter as alleged in his petition on the hearing of a case in bankruptcy before a Referee. The issue in the case is whether he was directed or employed to perform this work by anyone who had authority to engage him.

The evidence fails to show that the plaintiff was engaged or directed to perform the work for which he seeks to recover by anyone. Neither the Referee in Bankruptcy who presided at the hearings nor the Assistant United States Attorney who represented the defendant at the hearings or the Special Agent of the Federal Bureau of Investigation who was also present had any authority to employ him to report and make a transcript of the proceedings. He merely appeared at the hearings before the Referee and without any objection on the part of anyone proceeded to take down the evidence in shorthand and thereafter made

a transcript of the testimony which he furnished to the Referee and the representatives of the defendant.

The matter involved is fully covered in the volume entitled "Justice Department, Instructions, 1929," issued by the Department of Justice, in which the limitations on the authority of the District Attorney are fully set forth and shown to be controlled by Section 14 of the Act of May 28, 1896 (29 Stat. 140, 183). Under this Statute, actions which would create liability or result in the presentation of the claim covering services or expenses in particular cases, can only be taken after formal authority has been received from the Attorney General, and if the expense exceeds the sum of $25.00 competitive bids must accompany the application unless the expense is covered by annual written contracts.

The plaintiff seems to rely on an implied contract rather than an express one but as no one connected with the proceedings had any authority to enter into an express contract with him for his services, no contract could be implied even if the findings were otherwise sufficient, as they are not. See *Vlachos* v. *United States*, 90 C. Cls. 165.

The plaintiff's case is entirely without any foundation and his petition must be dismissed.

It is so ordered.

LEO M. HULL v. THE UNITED STATES

No. 45166

WILLIAM A. GERDTS v. THE UNITED STATES

No. 45167

[Decided May 4, 1942]

On the Proofs

Pay and allowances; commissioned warrant officer in Navy retired for disability.—Where a commissioned warrant officer in the Navy, promoted after service as an enlisted man, was retired for physical disability under the provisions of section 417 of Title 34, U. S. Code; and where said commissioned warrant officer at the date of his retirement had served more than 10 years in the commissioned service and more than 30 years in all; it is *held* that such retired commissioned warrant officer

so retired is entitled to retired pay of three-fourths of the pay allowable to an officer of his rank at retirement, as provided by section 991 of Title 34; and is not entitled to retired pay of three-fourths of the highest pay of his grade, as provided by section 383 of Title 34.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiffs. *Ansell, Ansell, & Marshall* were on the briefs.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

SPECIAL FINDINGS OF FACT IN NO. 45166

1. The plaintiff enlisted in the United States Navy on December 15, 1902, and served therein under various enlistments. On October 1, 1917, he accepted a temporary appointment as Carpenter to rank from September 24, 1917; on December 29, 1921, he accepted an appointment as Carpenter to rank from August 5, 1920; and on March 27, 1924, he accepted an appointment as Chief Carpenter (commissioned warrant officer) to rank from September 24, 1923. He continued on the active list under that appointment to December 1, 1934, when he was transferred to the retired list with that rank.

2. At the time of his retirement on December 1, 1934, plaintiff had to his credit 31 years, 8 months, and 18 days' active service, including enlisted, warrant officer, and commissioned warrant officer service. Of this time the plaintiff served 11 years, 2 months, and 7 days in the commissioned service.

3. By letter dated July 25, 1934, from the Acting Secretary of Navy, the plaintiff received the following direction:

> In accordance with the recommendation of a Board of Medical Survey before which you recently appeared, you will, when notified by the President, Naval Retiring Board, San Diego, California, that the necessary papers have arrived, report to that officer for examination for retirement in conformity with Title 34, Section 411, U. S. Code.

4. In obedience to the direction contained in the letter of July 25, 1934, referred to in the preceding finding, the plaintiff reported to the Naval Retiring Board on August 31, 1934, for examination. The board decided that the plaintiff was incapacitated for active service by reason of sclerosis, lateral amyotrophic; that his incapacity was permanent and the result of an incident of the service.

5. In a memorandum dated September 28, 1934, the Acting Secretary of the Navy recited the action of the board, referred to in the preceding finding, the last paragraph of the memorandum reading as follows:

> In view of all the circumstances in this case as set forth above, the Secretary of the Navy recommends that the findings of the Naval Retiring Board be approved, effective 1 December 1934, and that Chief Carpenter Leo M. Hull, U. S. Navy, on said date be retired from active service and placed on the retired list, in conformity with the provisions of U. S. Code, Title 34, Section 417.

6. By letter dated October 17, 1934, from the Chief of the Bureau of Navigation to the plaintiff, the plaintiff was advised as follows:

> 1. The Naval Retiring Board before which you recently appeared found you incapacitated for active service by reason of sclerosis, lateral amyotrophic; that your incapacity is permanent and is incident to the service.
>
> 2. The President of the United States, under date of 1 October 1934, approved the proceedings and findings of the Naval Retiring Board in your case, and on 1 December 1934 you will, in accordance with his direction, regard yourself as having been transferred to the retired list of officers of the Navy from that date, in conformity with the provisions of the U. S. Code, Title 34, Section 417.

7. Since December 1, 1934, plaintiff has been on the retired list and has been receiving retired pay at the rate of $172.50 per month, except for the period from December 1, 1934, to March 31, 1935, when he was paid at the rate of $163.87 per month, a reduction of 5 percent under the Economy Act. One hundred seventy-two dollars and fifty cents ($172.50) per month is 75 per centum of the pay allowable to a com-

missioned warrant officer of over 10 years' commissioned service. The highest pay of the grade in which plaintiff was serving at the time he was placed on the retired list was $300 a month.

8. Plaintiff claims that he was entitled to be placed on the retired list with three-fourths of the highest pay of the grade in which he was serving at the time he was retired, namely, $225 per month, in accordance with the Act of May 13, 1908 (U. S. Code, Title 34, Section 383). In this suit plaintiff claims the difference between the rate of $225 per month and the rate of $172.50 per month for the period from December 1, 1934, to the date of judgment.

9. On July 10, 1937, the plaintiff submitted a claim to the Comptroller General for the difference between the rate of $225 per month and the rate of $172.50 per month. The Comptroller General denied the claim on November 18, 1937.

10. If the court finds that the plaintiff is entitled to retired pay at the rate of $225 per month under the Act of May 13, 1908 (U. S. Code, Title 34, Section 383), there would be payable to him, according to computations made by the Comptroller General, the sum of $3,192.02 for the period from December 1, 1934, to December 31, 1939, date of latest pay roll on file. This claim is a continuing one.

SPECIAL FINDINGS OF FACT IN NO. 45167

1. The plaintiff enlisted in the United States Navy on February 15, 1890, and served therein under various enlistments. On February 23, 1918, he accepted a temporary appointment as Gunner to rank from February 20, 1918; on December 30, 1921, he accepted an appointment as Gunner to rank from August 5, 1920; and on October 10, 1924, he accepted an appointment as Chief Gunner (commissioned warrant officer) to rank from February 20, 1924. He continued on the active list under that appointment to March 1, 1935, when he was transferred to the retired list with that rank.

2. At the time of his retirement on March 1, 1935, the plaintiff had to his credit 44 years and 19 days' active service, including enlisted, warrant officer, and commissioned

warrant officer service. Of this time plaintiff served 11 years and 11 days in the commissioned service.

3. By letter dated October 9, 1934, from the Secretary of the Navy, the plaintiff received the following directions:

> In accordance with the recommendation of a Board of Medical Survey, before which you recently appeared, you will, when notified by the president of the Naval Retiring Board, San Diego, Calif., that the necessary papers have arrived, report to that officer for examination for retirement in conformity with Title 34, Section 411, U. S. Code.

4. In obedience to the direction contained in the letter of October 9, 1934, referred to in the preceding finding, the plaintiff reported to the Naval Retiring Board on November 23, 1934, for examination. The board decided that the plaintiff was incapacitated for active service by reason of arterial hypertension; that his incapacity was permanent and the result of an incident of the service.

5. In a memorandum dated December 21, 1934, the Secretary of the Navy recited the action of the board, referred to in the preceding finding, and made the following recommendation:

> In view of all the circumstances in this case as set forth above, the Secretary of the Navy recommends that the findings of the Naval Retiring Board be approved, effective 1 March 1935, and that Chief Gunner William A. Gerdts, U. S. Navy, on said date be retired from active service and placed on the retired list, in conformity with the provisions of U. S. Code, Title 34, Section 417.

6. By letter dated January 17, 1935, by the Acting Chief of the Bureau of Navigation to the plaintiff, the plaintiff was advised as follows:

> 1. The Naval Retiring Board before which you appeared found you incapacitated for active service by reason of arterial hypertension; that your incapacity is permanent, and is incident to the service.
>
> 2. The President of the United States, under date of 2 January 1935, approved the proceedings and findings of the Naval Retiring Board in your case, and on 1 March 1935, you will in accordance with his direction,

regard yourself as having been transferred to the retired list of officers of the Navy from that date, in conformity with the provisions of the U. S. Code, Title 34, Section 417.

7. Since March 1, 1935, plaintiff has been on the retired list and has been receiving retired pay at the rate of $172.50 per month, except for the month of March 1935, when he was paid $163.87 for said month, a reduction of 5 percent under the Economy Act. One hundred seventy-two dollars and fifty cents ($172.50) is 75 per centum of the pay allowable to a commissioned warrant officer of over 10 years' commissioned service. The highest pay of the grade in which plaintiff was serving at the time he was placed on the retired list was $300 a month.

8. Plaintiff claims that he was entitled to be placed on the retired list with three-fourths of the highest pay of the grade in which he was serving at the time he was retired, namely, $225 per month, in accordance with the Act of May 13, 1908 (U. S. C., Title 34, Section 383). In this suit plaintiff claims the difference between the rate of $225 per month and the rate of $172.50 per month for the period from March 1, 1935, to the date of judgment.

9. About July 7, 1937, the plaintiff submitted a claim to the Comptroller General for the difference between the rate of $225 per month and the rate of $172.50 per month. The Comptroller General denied the claim.

10. If the court finds that the plaintiff is entitled to retired pay at the rate of $225 per month under the Act of May 13, 1908 (U. S. C., Title 34, Section 383), there would be payable to him, according to computations made by the Comptroller General, the sum of $3,042.37 for the period from March 1, 1935, to December 31, 1939, date of latest pay roll on file. This claim is a continuing one.

The court decided that the plaintiff in each case was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the Court:

The two cases above named have been submitted together upon similar facts.

In each case it appears that the plaintiff had enlisted in the United States Navy and by successive reenlistments and promotions acquired the rank of commissioned warrant officer and after having been in active service more than thirty years and having had more than ten years' commissioned service was retired in accordance with the recommendation of the Board of Medical Survey before which he had appeared which found that the plaintiff was incapacitated for active service by reason of physical disability and that his incapacity was permanent and a result of an incident of the service. Thereafter the plaintiff in each case was notified by the Secretary of the Navy that the findings of the Naval Retiring Board had been approved and he was retired from active service and placed on the retired list in conformity with the provisions of the United States Code, Title 34, Section 417, and shortly afterwards each plaintiff was advised that the President of the United States had approved the proceedings and findings of the Naval Retiring Board and that he was to regard himself as having been transferred to the retired list of officers of the Navy in accordance with the provisions of the section last referred to above.

In each case, the plaintiff since his retirement has been receiving pay at the rate of $172.50 per month (less a deduction under the Economy Act) which is seventy-five percent of the pay of a commissioned warrant officer with over ten years' commissioned service.

Plaintiff in each case claims that he was entitled to be on the retired list with three-fourths of the highest pay of the grade in which he served at the time he was retired, that is, $225 per month as provided by the Act of May 13, 1908 (U. S. Code, Title 34, Section 383), and he claims a difference between the rate of $225 per month and $172.50 a month for the period during which he has been retired.

Section 417, Title 34, United States Code, provides:

> When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay (R. S. 1453).

Section 991, Title 34, United States Code, provides:

> Except as otherwise provided by law, the pay of all officers of the Navy who have been retired on account of age or length of service, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to 75 per centum of the pay provided by law for the grade or rank which they held, respectively, at the time of their retirement; and the pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the pay provided by law for the grade or rank held by them, respectively, at the time of their retirement (R. S. 1588; May 30, 1908, c. 227, 35 Stat. 501; Aug. 29, 1916, c. 417, 39 Stat. 579).

Section 383, Title 34, United States Code, provides:

> When an officer of the Navy has been thirty years in the service, he may, upon his own application, in the discretion of the President, be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade (May 13, 1908, c. 166, 35 Stat. 128).

The plaintiff in each case was retired under section 991 set out above and has received pay in accordance therewith. The respective plaintiffs make the contention that having been thirty years in the service, the retired pay should be based on section 383, Title 34, cited above, instead of section 991. It will be observed that section 383 provides that when an officer of the Navy has been thirty years in the service "he may, upon his own application, in the discretion of the President, be retired from active service and placed on the retired list." The plaintiffs made no application for retirement and if they had so done the granting of retirement would have been entirely in the discretion of the President. Section 383 only requires that the officer shall have been thirty years in the service and make application for retirement. It does not make it necessary that the applicant should be incapacitated. It was evidently intended to make a provision for the retirement of officers who were still able to perform the duties of their position but having served thirty years desired to retire, and give them the choice of re-

maining in the service or retiring upon three-fourths of the highest pay of their grade. The contention of the plaintiffs is that words "except as otherwise provided by law" in section 991 are intended to refer to and include the language of section 383 but as that section refers to an altogether different class of officers, namely those who were not incapacitated and desire to make application for retirement, while section 991 refers to those who are incapacitated and must be retired whether they desire such action or not, we think it is clear that section 383 has no application to the cases before us.

It follows that the petition in each case must be dismissed, and it is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JOHN JOSEPH BECKER v. THE UNITED STATES

[No. 45450. Decided May 4, 1942]

On the Proofs

Pay and allowances; officer in Naval Reserve with dependent mother.—Where it is conclusively shown that during the period involved in the instant case the plaintiff's mother has been dependent upon him for her chief support; it is *held* that the plaintiff, lieutenant, junior grade, U. S. Naval Reserve, on active duty, is entitled to the full allowance for rental and subsistence provided by law for an officer of his grade with dependent mother.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. June 6, 1935, plaintiff was appointed an ensign in the United States Navy and served on active duty in that capacity until June 4, 1937, when he was honorably discharged

because of physical disability. April 27, 1938, he was appointed an ensign in the Naval Reserve; October 2, 1940, he was promoted to lieutenant, junior grade, effective June 6, 1940, and since June 19, 1940, he has served on active duty at the Bureau of Navigation, Navy Department, Washington, D. C.

Plaintiff claims the statutory rental and subsistence allowances of an officer of his rank with a dependent mother, from June 19, 1940, to date of judgment.

2. Plaintiff's father, Charles Adam Becker, died January 12, 1940. The only property left by him was $4,000 in insurance, which was paid to his widow, approximately $1,000 of which she used to defray his funeral expenses.

3. The mother of plaintiff, Mrs. Helen M. Becker, is 66 years of age, has never been gainfully employed, and possesses no special training or skill which would enable her to obtain employment. She owns no real or income-producing personal property except the balance of her husband's insurance, $3,000, which is deposited in various banks and yields from one to two percent interest.

4. From the date of her husband's death until October 15, 1940, plaintiff's mother resided alone in a house owned by plaintiff located in Newport News, Virginia. In addition to furnishing her with this home, the rental value of which was about $50 a month, plaintiff contributed from $25 to $30 a month toward her living expenses from June 19, 1940, to October 15, 1940. Her only other income during this period was $27.73 a month, which she received from the Social Security Board beginning in September 1940; $100 contributed by her son, Charles Henry Becker, lieutenant, junior grade, U. S. Navy; $100 realized from the sale of her furniture, and interest on her bank deposits. Her son, Charles Henry, is married to a French girl, whose sister lives in France and has required considerable financial assistance from him. He has made no contribution to the support of his mother except the $100 mentioned, allotted out of his salary during the months of July, August, September, and October, 1940.

While living in Newport News her monthly living expenses were as follows: $30 for food; $6 to $8 for gas and electricity; $3.50 or $4 for telephone, and about $2 for club

dues. She purchased clothing out of the $100 realized from the sale of her furniture.

5. Plaintiff and his mother have resided in an apartment in Arlington, Virginia, since October 15, 1940. Their joint living expenses there, which have been paid by plaintiff, have averaged from $151.50 to $156.50 monthly, as follows: Rent, $56.50; food, $60; electricity, $4; telephone, $3; laundry, $8; and expenses incident to the care and maintenance of their apartment, and transportation, $20 or $25. Plaintiff's mother has paid for her personal expenses, including clothing, church contributions, recreation, and medical and dental bills, out of the money she has received from the Social Security Board.

6. Since June 19, 1940, plaintiff has not been assigned public quarters. He has never made application for Government quarters for himself and dependent because he was advised by indorsement on his orders that no Government quarters were available. However, he has been paid rental allowances for himself as a bachelor officer. He filed claim for increased rental and subsistence allowances on account of a dependent mother, but his claim was disallowed by the Comptroller General.

7. If the court should hold that plaintiff is entitled to the rental and subsistence allowances which he claims, there would be due him $359.60 from June 19, 1940, to March 31, 1941, the date of the latest available roll in the General Accounting Office. This is a continuing claim, as long as he continues in active service.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam* as follows:

This action is brought by an officer of the United States Naval Reserve Force, now in active service, to recover increased rental and subsistence allowances claimed on account of the alleged dependency of his mother, under the provision of the Act of June 10, 1922 (42 Stat. 625), as amended by the Act of May 31, 1924 (43 Stat. 250).

The facts are not in dispute. The findings show conclusively that during the period involved in the case the plaintiff's mother has been dependent upon him for her chief

support and he is therefore entitled to the full allowance for rental and subsistence provided by law for his grade. He has been paid the rental allowance which the law provides for a bachelor officer without dependents and is consequently entitled to receive in addition the difference between the amount due him as stated above and the sum paid him.

The claim is a continuing one as long as plaintiff remains in the active service. Judgment will accordingly be withheld pending the receipt of a report from the General Accounting Office of the amount due him in accordance with this opinion, when judgment will be entered.

In accordance with the above decision and upon a report from the General Accounting Office showing the amount due thereunder, the court on October 5, 1942, entered judgment for the plaintiff in the sum of $861.67.

LESLIE L. LEVEQUE, AN INDIVIDUAL, WALTER WILL, AN INDIVIDUAL, THE L. L. LEVEQUE COMPANY, A CORPORATION, AND DAVID GORDON BUILDING & CONSTRUCTION COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 45507. Decided May 4, 1942]

On Motion to Dismiss

Government contract; provision stipulating minimum wage rates; changed economic conditions; increase of wages paid.—Where a contract with the Government established minimum wage rates which should be paid by the contractor on the project; and where on account of changed economic conditions it became necessary for said contractor to pay increased wages; it is *held* that the contract did not purport to set or determine the wages which should be paid in connection with the project, and plaintiffs' claim (B) to recover the amount of such increases in excess of the minimum rates prescribed in the contract does not constitute a cause of action against the defendant.

Same; discretionary authority.—Where a provision of the contract authorized the Administrator of the Housing Authority, representing the Government, to establish different minimum wage rates upon a fundamental change in economic conditions; it is *held* that such change in minimum wage rates was a matter within the discretion of the Administrator.

Same; second contract.—The fact that plaintiffs and defendant subsequently executed a second contract which stipulated a different minimum wage level than that provided in the instant case does not affect the obligations of the contract upon which plaintiffs sue in the instant case; increases in the second contract did not operate as a waiver of wage stipulations in the first contract.

Mr. Caesar L. Aiello for the plaintiff. *McKenney, Flannery & Craighill* were on the brief.

Mr. Mortimer B. Wolf, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

JONES, *Judge*, delivered the opinion of the court:

Plaintiffs instituted this suit on two claims arising out of a contract for the construction of superstructures for Laurel Homes Housing Project in Cincinnati, Ohio. They set forth Claims A and B.

Claim A is for a balance alleged to be due as a part of the contract price for such construction.

Claim B is for the sum of $240,045.54, which amount plaintiffs assert was paid for wages in excess of the minimum rates prescribed in the contract.

Defendant moves the court to dismiss Claim B of plaintiffs' petition on the ground that it fails to state a cause of action against the United States. Claim A is not involved in the motion to dismiss.

Plaintiffs allege that on Friday, January 22, 1937, there occurred in the Ohio Valley the greatest flood in its history, and that as a result of the flood which extended over a period of ten days, there was created a vast amount of building and repair work in the river valleys; that a very serious shortage of labor in the construction trades followed and that as a result of such conditions it was necessary for the plaintiffs to pay increased wages in the sum indicated. Plaintiffs further allege that on account of the provisions of the contract, together with other acts on the part of the defendant, plaintiffs are entitled to recover the amount of such increased wages.

The pertinent parts of the contract are as follows:

> ART. 18 (a) There shall be paid each employee engaged on the project in the trades or occupation listed in the Specification *not less than* the hourly, weekly, or monthly wage rate prescribed for the same in the Specification. * * *
>
> ART. 19 (a) The *minimum wage rates* herein established shall be subject to change by the Administrator. In the event that as a result of fundamental changes in economic conditions the Administrator from time to time establishes different *minimum wage rates* from those specified in the contract or contracts for work on the project, the contract price shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost or decreased in an amount equal to such decreased cost. [Italics supplied.]

Section 5 of the special conditions of the contract (Specifications pp. 17–18) provides as follows:

> SEC. 5. WAGE RATES * * *
>
> 1. Subject to the Specification, and the Contract, the hourly wage rates to be paid by the Contractors shall be *not less than the* following: * * *
>
> * * * * * * *
>
> 5. *The foregoing specified wage rates are minimum rates only and the Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All dispute in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor.* [Italics supplied]

Plaintiffs further allege that during the period of the contract the defendant authorized increased working hours and increased wages on a general scale in connection with a Resettlement project known as Green Hills in North Cincinnati, and that such Government work being carried on contemporaneously with plaintiffs' work the defendant thereby created a condition which forced plaintiffs to increase wages in order to insure the timely and satisfactory completion of the work for which they had contracted.

It is further alleged that the defendant recognized that a fundamental change in economic conditions had taken place and consequently it became the duty of the defendant, pursuant to the terms of the contract, to adjust the contract price accordingly.

In the light of the provisions of the contract and specifications we do not think the allegations in reference to Claim B are sufficient to state a cause of action.

The contract did not purport to set or determine the wages which should be paid in connection with the project. It simply established minimum wage rates below which plaintiffs might not go. It provided a flooring, but in no sense undertook to guarantee that the minimum wage rate should be the actual wages to be paid.

While the provisions of Article 19 (a) authorized the administrator to change the minimum wage rates as a result of fundamental changes in economic conditions, this is a matter which was left to his discretion. Its manifest purpose was to protect labor so that in the event changing conditions made it advisable he might increase the minimum requirements in order that labor should be assured a proper wage. It provided that if the administrator should stipulate a higher minimum wage as a requirement of the contract, the contract price should be adjusted accordingly. This step was not taken. On the contrary, the administrator specifically declined to take such action.

This interpretation is made doubly clear by the special conditions set out in Section 5 of the special conditions in the specifications wherein it is stated that the "specified wage rates are minimum rates only and the Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate."

This viewpoint is further strengthened by the fact that in the original printed form of the contract (attached to plaintiffs' petition) the first sentence of Article 18 was printed to read as follows:

> There shall be paid each employee engaged on the project in the trade or occupation listed in the Specification, the hourly, weekly or monthly wage prescribed for the same in the Specification. * * *

This sentence was stricken from the contract and the following typewritten statement inserted:

> ARTICLE 18. The first sentence in paragraph (a) has been changed to read as follows:
> "There shall be paid each employee engaged on the project in the trades or occupations listed in the Specification *not less than* the hourly, weekly, or monthly wage rate prescribed for the same in the Specification."

Likewise the printed form of Article 19 (a) was changed so that instead of specifying wage rates it provided for minimum wage rates.

These changes and provisions show clearly that the parties did not establish a wage schedule, but rather a flooring for wage rates.

To construe the contract as meaning that there is no difference between a contract setting the rates of pay and one prescribing minimum rates, and that defendant is obligated to increase the minimum rates at any time wages are increased, is to ignore the plain terms of the contract and specifications.[1]

We do not think the fact that another branch of the Government found it advisable to increase wages on an entirely different project in the same vicinity created any obligation on the part of the Government to vary the terms of the contract which plaintiffs had undertaken.

The same conditions apparently caused the wages to be increased on both projects. These conditions were the fault of neither the defendant nor the plaintiffs.

The fact that plaintiffs and defendant executed a second contract on June 23, 1937, which stipulated a different minimum wage level than that provided in the instant case does not affect the obligations of the contract upon which plaintiffs sue. The increases in the minimum wage levels provided in the second contract indicated only a recognition by the defendant that wage levels had in fact risen in the vicinity. The second contract like the first provided that plaintiffs assume the risk of all wage increases in excess of the minimum. The increases in the second contract did

[1] *Carroll* v. *United States*, 67 C. Cls. 513, 518.

not operate as a waiver of Special Condition 5 of the first contract.

For the reasons stated the motion to dismiss Claim B of plaintiffs' petition is sustained and the petition as to said claim is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

GENERAL CONTRACTING CORPORATION v. THE UNITED STATES

[No. 43534. Decided June 1, 1942]

On the Proofs

Government contract; dredging of navigable channel; conditions not misrepresented.—Where plaintiff by contract with the Government undertook to dredge a temporary channel in a pool below the site of a proposed lock and dam in the Allegheny River near Rimerton, Pennsylvania; and where in the Schedule of Conditions accompanying defendant's invitation for bids it was stated "that bidders will visit the site of the work and acquaint themselves with all information concerning the nature of the materials that will be encountered in the river bed and other conditions likely to affect the prosecution of the work"; and where before advertising for bids defendant caused certain test pits to be dug, the result of which tests were made available to bidders, including plaintiff; and where representatives of plaintiff, including plaintiff's president, did visit and inspect the site; and where it is established by the evidence adduced that the materials encountered were not substantially different from those indicated in the specifications and the borings in the contract area; it is *held*, that there was no misrepresentation of conditions which would entitle the plaintiff to recover for excess costs incurred. *C. W. Blakeslee and Sons, Inc.* v. *United States*, 89 C. Cls. 226, 246, cited.

Same.—Plaintiff's claim for damage to machinery is not sustained by the evidence.

Same.—Where plaintiff's claim was presented to the proper authorities and denied; and where the action of said authorities was neither arbitrary nor capricious; it is *held* that plaintiff is not entitled to the remission of the amount assessed as liquidated damages.

The Reporter's statement of the case:

Mr. William D. Harris for the plaintiff. *Messrs. Seiforde M. Stellwagen, Palmer & Neale* were on the brief.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Charles Bertrand Bayly, Jr.*, was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Delaware corporation having its principal office at Pittsburgh, Pennsylvania. Since 1923 it has been engaged chiefly in dredging work on the Ohio River and its tributaries, including the Allegheny River.

2. June 12, 1935, the United States Engineer Office, U. S. Army, at Pittsburgh, Pennsylvania, through Major W. D. Styer, District Engineer, issued an advance notice to bidders that it expected to advertise as soon as funds were available for the dredging of a temporary channel in Pool No. 8, below the site of proposed Lock and Dam No. 9, in the Allegheny River, near Rimerton, Pa. This notice called for the excavation of a channel approximately 4,000 feet in length, the bottom width varying from 100 to 150 feet and averaging about 105 feet; and for the removal and disposal of approximately 162,000 cubic yards of material lying above elevation 790.00 within the areas specified on a sketch attached to the notice. The notice contained the following provision:

> *Character of material.*—Test pits dug by a 1½-yard clamshell bucket determined the material in general to be sand, gravel, small boulders and some one-man stones. Classification of material from the test pits are listed on the attached sheet marked "Test pits for dredging below Lock No. 9, Allegheny River."

The notice further stated that the proposed dredging work was set out in detail on Sheets 1, 2, and 3 of drawings marked "Allegheny River Survey below Lock No. 9," on file in the District Engineer's Office at Pittsburgh and available to prospective bidders, and that there were also in that office, available to prospective bidders, records of two gas lines owned by Phillips Oil and Gas Company crossing the river at the site of the work called for by the notice.

3. Before advertising for bids defendant caused certain test pits to be dug under the supervision of one of its engineers and estimators, who listed the materials encountered and recorded his findings on a test pit data table. The location of these test pits, three of which, Nos. 14, 17, and 19, were inside the contract area, is shown on a map which accompanied the advance notice to bidders. This notice and accompanying map, together with the test pit data table, are of record as Plaintiff's Exhibit 1 and are made a part hereof by reference. Defendant also made core borings at points adjacent to the area proposed to be excavated and a record of these borings was also made available to prospective bidders at Lock No. 8, near the site of the proposed work.

4. While awaiting the invitation to bidders plaintiff's president, B. B. Byers, visited the contract area, waded into the river and examined the material taken from test pits 14, 17 and 19. He dived into these holes, felt the walls thereof, found no boulders and concluded that the materials to be excavated felt like a combination of mud, sand and some small gravel, and were such as were indicated in the test pit data table. He then returned to his Pittsburgh office and on July 9, 1935, wrote Orren McCullough, an employe of the Allegheny River Sand and Gravel Co., who had dug the pits, requesting certain information in regard to the test pits. July 10, 1935, McCullough replied that the digging was medium with a 1½-yard Williams' bucket; that the digging did not damage the bucket, as it was broken in seven places before he "started it" on the job; that he did not strike any hard layers; and that the 13 holes which he dug, the digging of which required 75 hours, averaged 14 feet in depth.

C. E. Ashcraft, plaintiff's engineer, now employed as an engineer by the United States Engineer Office, after making several trips to the District Engineer's office seeking information regarding this project, reported to plaintiff's president that the data he secured were "a confirmation of the test-hole data". Ashcraft submitted to plaintiff's president a proposed estimate based on the digging of the test pits with a clamshell bucket and encountering sand and gravel, with boulders and large stones, and reported that the dig-

ging with a clamshell bucket would be medium hard and less than medium hard with a dragline bucket. He estimated that it would take three months to complete the contract, thus avoiding holding the equipment on the site over the winter months. A computation was made by him of a bid at .277 per cubic yard.

Plantiff's president also inspected the core borings exhibited at Lock No. 8, which had been previously drilled in the vicinity of Lock and Dam No. 9, and which disclosed materials consistent with those shown in the test pit data table. July 17, 1935, Byers, with the assistance of Ashcraft, prepared another estimate which resulted in an estimated bid of 31 cents per cubic yard. July 22, 1935, Ashcraft and plaintiff's president inspected the operations of the Phillips Oil and Gas Company, which at that time was dredging a pipe line trench across the entire river, crossing the contract area, and Ashcraft, in a written report, stated that the digging appeared to be fairly hard for a dipper dredge, and that the material was undoubtedly very compact. He concluded his report as follows:

> I believe there will be no question about digging it with a scraper at the capacity we have estimated provided no cemented strata are encountered, and these do not seem to be indicated either by the test holes or the dredging operations.

It was on the basis of the above information that plaintiff prepared and submitted its bid of .295 per cubic yard, which was the lowest bid. Before bids were received the United States Engineers estimated, on the basis of the information secured by defendant in its preliminary testing operations, that a bid price of .542 per cubic yard, with an estimated total of $87,897.00, would be reasonable.

Two of the test pits which defendant caused to be dug were not recorded in the test pit data table, one being 500 feet outside the contract area and the other 250 feet below the downstream end of the contract area. There is no satisfactory or convincing proof that the failure of defendant to advise prospective bidders, including plaintiff, as to the materials encountered in these two test pits prejudiced plaintiff in any way in its investigations and observations

which led it to conclude that the materials to be excavated were approximately as indicated in the test pit data table and that the digging would be hard.

5. The defendant did not misrepresent the character of materials to be dredged. It gave to bidders the best information that it had with reference to the character of such materials.

Plaintiff has been engaged in dredging work on the Ohio River and its tributaries since 1923, and has had extensive experience in river dredging in the vicinity of the area involved in this suit. The Government furnished to prospective bidders more data concerning this project than it ordinarily supplied on similar projects.

6. July 3, 1935, defendant through Major W. D. Styer, District Engineer at Pittsburgh, issued an invitation for bids, stating that sealed bids on the schedule attached to the invitation, subject to the applicable conditions on the standard form of contract for the work proposed and the specifications covering the project, would be received at his office until 12.30 p. m. July 23, 1935, and then opened, and that one complete set of plans, specifications and bidding papers covering the proposed dredging work would be on exhibition at the office of the U. S. District Engineer, New York City, in addition to his office in Pittsburgh, where they might be inspected.

July 23, 1935, plaintiff, in compliance with the invitation for bids and subject to the conditions thereof and of the specifications, submitted its bid in which it agreed to furnish all labor and material and perform all work required for excavating a navigation channel of approximately 162,000 cubic yards of sand, gravel, mud and some boulders and one-man stones near Rimerton, Pa., in Pool No. 8, Allegheny River, for the consideration of a unit price of .295 per cubic yard, or a total of $47,790.00. The Schedule of Conditions accompanying the invitation for bids provided:

> It is expected that bidders will visit the site of the work and acquaint themselves with all information concerning the nature of the materials that will be encountered in the river bed and all other conditions likely to affect the prosecution of the work. Core borings from the vicinity of the proposed Lock and Dam No. 9, Al-

legheny River, are on exhibition at Lock No. 8, Allegheny River, where they may be inspected by prospective bidders. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder from assuming all responsibility for estimating the difficulties and cost of successfully performing the complete work as required.

This schedule also provided that the work specified therein was to commence within 10 calendar days after receipt of notice to proceed and was to be completed as provided in paragraph 1–03 of the specifications, which provision was carried into plaintiff's contract.

7. Bids were opened July 23, 1935, and plaintiff's bid, being the lowest, was accepted. Accordingly on July 29, 1935, a contract, embodying the specifications upon the basis of which the bid was prepared, was executed by plaintiff through its president, B. B. Byers, and defendant through Major W. D. Styer, District Engineer, War Department, as contracting officer, which contract was approved by Lieut. Col. R. G. Powell, Division Engineer, Ohio River Division, on August 19, 1935. The contract was received by plaintiff August 26, 1935, accompanied by a notice to proceed, thus fixing September 5, 1935, as the date for commencement of work and April 30, 1936, as the completion date. Major W. D. Styer, defendant's contracting officer, was succeeded in October 1935, by Capt. H. A. Montgomery; Major Styer returned to his duties as contracting officer in January 1936, and was succeeded in the spring of 1936 by Lieut. Col. W. E. R. Covell. Plaintiff began work in Area 1 on August 27, 1935.

Paragraph 1–03 of the specifications provided in part as follows:

1–03. *Commencement, prosecution, and completion.*—(a) The contractor will be required to commence work under the contract within 10 calendar days after the date of receipt by him of notice to proceed, to prosecute the said work at an average rate of not less than 25,000 cubic yards per month during the first month after the limiting date fixed for commencement, and at an average rate of not less than 40,000 cubic yards per month thereafter, and to complete it within the time determined by applying to the total quantity of ma-

terial to be paid for actually removed under the contract the average monthly rates above stipulated, for the periods to which each rate applies; * * *.

(c) In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion, the contractor shall pay to the Government as liquidated damages the sum of $20.00 for each calendar day of delay until the work is completed or accepted.

No work will be required during the period December 16 and March 31 inclusive. If he so desires, the contractor may work during any part or all of this period upon given written notice of his desire to the contracting officer; but whether he works or not, no part of the period above named will be considered in computing the time allowed for completion, or in computing liquidated damages.

If, however, the contractor elects to work during any part of the period above named, and the monthly average work accomplished is any percentage less than 25,000 cubic yards and the contracting officer maintains an inspection force during this time for the purpose of supervising the work, the contractor will be charged this same percentage of the cost of maintenance of such inspection force.

Under this provision of the specifications the contract period was 4⅓ months. Under Change Order No. 1 the period for completion was extended 23 days, or until May 23, 1936, and under Change Order No. 2 the contract price was increased $250.00, which, with certain later adjustments, increased the contract price to $48,830.96. The contract was completed August 15, 1936, and plaintiff was assessed liquidated damages for a delay of 84 days at $20.00 a day, or $1,680.00, under Article 9 of the contract and paragraph 1–03 of the specifications.

8. The specifications, forming a part of the contract, contained the following provisions:

1–02. *Work to be done.*—* * *

(b) The contractor shall perform, directly and without subcontracting, not less than twenty-five percentum (25%) of the project, to be calculated on the basis of the contract price and the cost of materials, supplies and equipment furnished by the Government.

(c) The work to be done consists in the removal and disposal of all material lying above elevation 790.0 as

measured on the upper gage at Lock No. 8, Allegheny River (10 feet below the proposed crest of Dam 8, Allegheny River), within the specified areas shown by cross-hatching on the maps described in paragraph 1–06 of the specifications. The channel shall be excavated for a distance of approximately 4000 feet, the bottom width varying from 100 feet to 150 feet and averaging 105 feet.

1–06. *Maps and drawings.*—The work shall conform to drawings marked Allegheny River Survey Below Lock No. 9, Sheets Nos. 1, 2, and 3, File No. 038–L9, which form a part of the specifications, and which are filed in the United States Engineer Office at Pittsburgh, Pa.

1–13. *Character of materials.*—The location and logs of the test pits made by the United States to determine the character of materials to be removed are shown on sheets Nos. 2 and 3 of the drawings referred to in paragraph 1–06 of these specifications. The United States does not guarantee that other materials will not be encountered nor that the proportions of the several materials will not vary from those indicated by the explorations. Bidders are expected to examine the site of the work, and the logs of the test pits, and after investigation, decide for themselves the character of the materials and make their bids accordingly. In the execution of the work prescribed in paragraph 1–02 of these specifications, all materials of the character developed by the explorations, in whatever proportions they may be encountered, or as otherwise above described, and all other materials which, in the opinion of the contracting officer, can be removed and disposed of by means of a plant equivalent to a 2½-yard dipper dredge with the aid of a ten-ton capacity derrick boat, divers, and blasting, shall be removed and disposed of by the contractor at the contract price. In the event that materials, structures, or obstacles of a substantially different character are encountered in the execution of the prescribed work and their removal or satisfactory treatment, in the opinion of the contracting officer, involves any increase or decrease in cost and/or difference in time, it will be adjusted in accordance with the provisions of Article 4 of the contract. [Article 4 is quoted in finding 11.]

2–01. *Method of measurement.*—The material removed will be measured by the cubic yard in place by means of soundings and/or sweepings taken before and after dredging. The maps already prepared (par.

1–06) are believed to represent accurately the average existing conditions; but the depths shown thereon will be verified and corrected, if necessary, by soundings taken shortly before dredging under these specifications is begun in any locality.

Longitudinally the contract area, which was divided into three sections designated as Areas Nos. 1, 2 and 3, extended about 4,100 feet and paralleled the left bank of the river downstream. Area No. 1, about 1,200 feet in length, was the downstream area; Area No. 2, about 1,500 feet long, was the next area upstream, and Area No. 3, approximately 1,400 feet in length, was the upstream end of the project. Areas for the disposal of the dredged material were provided on the left river bank.

The area involved in this contract was one of four proposed parallel channels which the Government contemplated dredging in the river, the total width of the four channels being about 500 feet from the left edge of the contract area. At the immediate right of this area was a proposed channel known as Section No. 1, to be dredged about 200 feet in width, which with the next two sections, known as Nos. 2 and 3, each approximately 100 feet in width, constituted the entire proposed project. October 25, 1935, plaintiff and Walter S. Rae jointly contracted with the defendant for the dredging of Section No. 1. The performance of that contract, referred to as the "joint contract," was carried on concurrently with plaintiff's contract in suit during the spring and summer of 1936. Contracts for the remaining Sections 2 and 3 were let in 1939 to the Dravo Construction Company.

9. In Area 1 plaintiff encountered some clay and silt, much sand and gravel, and some boulders. The digging was not hard and its 3½-cubic-yard dipper dredge *Pelican* removed from this area an average of 40 cubic yards per hour. In Area 2 some clay and silt, sand, and gravel were encountered. The material was more compact than that in Area 1, more rock was removed from this area than from either Areas 1 or 3, and the *Pelican* averaged 66 cubic yards per hour, which was accounted for in part by the fact that harder digging, with a "straight face" to work against,

increased the *Pelican's* average amount of excavation. A few small chunks or pockets of cemented material, i. e., compacted sand, were encountered in this area but not to any unreasonable extent. Plaintiff's daily log does not mention "cemented material." Excavation in the immediately adjacent area under the joint contract did not disclose cemented material, but did disclose material as shown in defendant's test pit data table. While excavating in Area 3 plaintiff encountered a 20-foot strip of soft, sandy material along the left bank. This was first handled by the dredge, then by the dragline, in order to place it in the disposal area, and when it reached that area it carried a high percent of water, as plaintiff did not adequately provide for the proper drainage of this material. The digging in Area 3 was otherwise medium and the *Pelican* averaged 75 cubic yards per hour. The disposal area lay next to and parallel with Area 2, and material from Areas 1 and 2 was deposited by the dragline on the disposal area where it was smoothed by bulldozers. The disposal area adjacent to Area 3, being narrow was not large enough to accommodate all the material from the area, and it had to be loaded on trucks, hauled up the river, and deposited on land adjacent to Area 2. Plaintiff subcontracted this hauling, and the subcontractor, being inexperienced, encountered considerable difficulty in disposing of the soft, watery material.

10. The specifications provided in regard to equipment in part as follows:

> 5–01. *Plant.*—The contractor agrees to place on the job sufficient plant of size suitable to meet the requirements of the work. Plant shall be kept at all times in condition for efficient work and subject to the inspection of the contracting officer. It is understood that award of this contract shall not be construed as a guaranty by the United States that plant listed in statement of contractor for use on this contract is adequate for the performance of the work.
>
> (a) All scows must be kept in good condition, the coamings kept repaired, and the pockets provided with proper doors or appliances to prevent leakage of material.
>
> (b) All pipe lines for hydraulic machines must be kept in good condition at all times, and any leaks or

breaks along their length must be promptly and properly repaired.

No reduction in the capacity of the plant employed on the work shall be made except by written permission of the contracting officer. The measure of the "capacity of the plant" shall be its actual performance on the work to which these specifications apply.

A Sauerman scraper was the only digging equipment included in plaintiff's bid. After submitting its bid, and before work was started on the contract, plaintiff decided to use a K–55 Link-Belt dragline, with a 2 cubic-yard bucket, instead of the scraper. The dragline commenced work on August 27, 1935, and after 30 cubic yards had been excavated it broke down and began operating again on August 29. It was a rebuilt machine and required many adjustments while on the job, particularly with regard to its swinging mechanism. It could not penetrate the materials to be dredged. During the period from August 29 to September 24, 1935, the dragline removed only 1,500 cubic yards of material, whereas the contract provided for the removal of 25,000 cubic yards during the first month after commencement of work. It broke down October 3, 1935, and was rebuilt, being out of use until October 15, 1935. It resumed excavating on October 15 in the disposal area and so continued until December 19, 1935, when it ceased operating for the winter. On September 24, 1935, at defendant's request, and before the breakdown of the dragline, plaintiff brought on the job a 3½ cubic-yard dipper dredge *Pelican*, which started excavating September 25. It excavated in 20-foot strips, casting each load toward shore within reach of the dragline located on the bank, which in turn deposited the material on the disposal area. Plaintiff's *Pelican* operators tried, without success, to penetrate the 12-foot face of material in one cut, which resulted in breaking the *Pelican's* cables, steel bucket, main drum shaft, and main hoist drum. The *Pelican* had been in use for 20 years and its hull and boiler tubes leaked, as a result of which steam was diminished, hampering plaintiff's operations. Its grate bars burned out while on this job, the cable drum was worn thin when it arrived on the site, and the bucket was of infe-

rior quality. Within six weeks after its arrival, the bucket cracked and had to be replaced, which delayed plaintiff one full week. Defendant notified plaintiff by letter of October 21, 1935, that it would have to secure additional equipment, and on October 24, 1935, plaintiff brought on the job a derrick boat, with a 25-ton capacity, equipped with a 1¾-cubic-yard clamshell bucket. The condition of the dipper dredge *Pelican* was such that it underwent frequent repairs until December 8, 1935, when it and the derrick boat ceased operating for the winter. The dragline, as heretofore stated, continued work in the disposal area until December 19.

In accordance with paragraph 1–03 (c) of the specifications, no work was performed between December 19, 1935, and March 31, 1936, and under Change Order No. 1 plaintiff was allowed an extension of 23 days from April 1 to 23, due to unfavorable weather. Plaintiff resumed work April 24, 1936, and during the balance of the contract period continued to have difficulty with its equipment.

11. Paragraph 6–01 of the specifications provided as follows:

> *Claims and protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately, and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling.

The contract provided in part as follows:

> ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representa-

tive, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

ART. 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

November 14, 1935, plaintiff made written request of the contracting officer for an allowance of 6 additional days because of damage to the bucket of the dredge *Pelican*, alleged to have been due to the hard material it contacted. The contracting officer denied the requested extension and on December 21, 1935, advised plaintiff of his decision as follows:

I have investigated the causes and extent of the delay and my findings of the fact are as follows:

* * * * *

(b) That on November 8, 1935, at 7:20 P. M., the Dredge *Pelican* damaged its bucket to such an extent that the dredge ceased operations and a new bucket had to be supplied from the manufacturers. The dredge resumed operations at 4:00 P. M. on November 15, 1935.

(c) That the bucket of the dredge *Pelican* was in need of repairs at the time the dredge arrived on the job, and that the material encountered was not of sufficient hardness to have damaged a bucket in good condition.

(d) That during the delay suffered by the dredge *Pelican*, your dragline and derrick boat continued operations on the project.

I find that resulting from the circumstances hereinbefore stated, you were not delayed in completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor. An extension of time for completion of the work will not be granted.

No appeal from this decision was taken by plaintiff.

November 21 and December 23, 1935, plaintiff wrote the contracting officer requesting extra time and compensation because of defendant's alleged misrepresentation of the character of materials to be excavated, in that the information and data furnished failed to disclose the existence of large bodies of cemented conglomerate. After an extended investigation of this claim the contracting officer found, and so advised plaintiff, that there was no ground for the claim and denied it January 24, 1936. Plaintiff on February 8, 1936, appealed from that decision to the "Chief of Engineers, U. S. Army, Washington, D. C., through the District Engineer Officer, Pittsburgh, Pa." The Chief of Engineers was the authorized representative of the head of the department under Articles 15 and 28 of the contract. Plaintiff's written appeal is of record as part of Plaintiff's Exhibit 18 and is by reference made a part hereof. The Chief of Engineers, after consideration, denied the appeal and affirmed the decision of the contracting officer on October 13, 1936. The Chief of Engineers furnished plaintiff his written findings and decision which were in part as follows:

> Careful consideration has been given to your communications of February 8, 1936, June 1 and 26, 1936, and July 6, 1936, and accompanying inclosures, requesting review of the action of the United States District Engineer, Pittsburgh, Pennsylvania, in disallowing claim for extension of time and adjustment of contract price based on subsurface or latent conditions differing from those indicated in the specifications and drawings under contract No. ER–W–1101–eng–1, for dredging a temporary channel in pool No. 8, Allegheny River.
>
> The claim is made that the data represented by test pits Nos. 14, 17, and 19, consisting of sand, small gravel, and one-man stone, constitute a warranty relative to the character and nature of the materials to be found at the site of the work. You state that cemented materials, a large percentage of rock under one cubic yard in size, and shale not disclosed by the test pits were encountered, resulting in excessive costs for handling and in numerous breakdowns to your three-cubic-yard-dipper dredge.
>
> * * * * *
>
> With reference to your contention that the specifications are in error in representing the material as sand,

gravel, mud and some boulders and one-man stone, the contracting officer, on the basis of frequent inspections, reports that these are the only materials which have been encountered in any appreciable amount. The record further discloses that cemented materials were not encountered in extensive quantities and that the rather large percentage of medium-size boulders appearing in photographs "A" and "B", accompanying your appeal, represent stone collected for use as riprap under a contract for an adjacent dredging project. In addition, the report of inspectors discloses that the shale encountered was loose, in small quantity, and not in its natural state.

* * * * *

With reference to your contention of excessive costs incurred and breakdown of your plant due to subsurface conditions, the record discloses that excavation was commenced on August 27, 1935, a diesel caterpillar dragline with a 1¾-cubic-yard bucket being used for the work. Due to the inadequacy of this equipment for the performance of the work, the dipper dredge *Pelican*, equipped with a 3-cubic-yard bucket, was placed in operation on September 24, 1935, and the dragline thereafter used for recasting material into the disposal area. The records disclose that the dredge *Pelican* was not in good operating condition when it arrived on the project. The hull leaked badly, requiring almost constant use of steam siphons to keep it afloat. The boiler tubes also were leaking, grate bars were defective, and the fire door was broken off. During the period from September 25 to December 9, 1935, it is estimated that the dredge lost 35% of the possible working time due to major and minor repairs, lack of steam, and awaiting repair parts. From April 24, 1936, to June 13, 1936, the working time of the plant was curtailed 30% due to breakdowns and repairs. Under these circumstances, it is considered that the delays and excess costs incurred were due to inefficiency of your plant, rather than to unusual dredging conditions encountered at the site. Paragraph 1–21 of the specifications, in this regard, provides in part as follows:

"It is understood that award of the contract shall not be construed as a guaranty by the United States that the plant listed by the contractor in the bid form is adequate for the performance of the work."

* * * * *

In view of the foregoing, I find that the facts fail to present subsurface or latent conditions at the site differ-

ing materially from those shown on the drawings or represented in the specifications, as contemplated by Article 4 of the contract, and that there is no basis for increasing the contract unit prices or extending the time for the completion of the work.

May 12 and 23, 1936, plaintiff made written application to the contracting officer, requesting 5 days' additional time because of a breakdown of the dredge *Pelican* and the dragline. After investigating this claim the contracting officer on May 19, 1936, made written findings and decision thereon in part as follows:

> (c) That at 12:00 noon on May 7, 1936 the main shaft on the dredge *Pelican* broke and at 7:00 A. M. on May 8, 1936, the vertical swing shaft on your "dragline" broke and, you were forced to cease work while parts were being fabricated and repairs made, until 3:00 P. M. on May 12, 1936, at which time work was resumed. You were thus delayed five (5) days.
>
> I find that, since paragraph 1–21 of the specifications states that "All plant shall be maintained in good working order and provisions shall be made for emergency repairs" it is the responsibility of the contractor to make provisions for emergency repairs, and resulting from the circumstances hereinbefore stated, an extension of time in which to complete the work will not be granted under Article 9 of the contract.
>
> Should you not agree to this finding of facts, you have the right to appeal under Article 9 of your contract. Your attention is specifically directed to the fact that your appeal must be made within 30 days in order to receive consideration. Appeals should be addressed as follows:
>
> "To the Chief of Engineers, U. S. Army, through the District Engineer, U. S. Engineer Office, Pittsburgh, Penna., 925 New Federal Building, Pittsburgh, Penna."

Plaintiff appealed and on October 13, 1936, the Chief of Engineers, acting for the head of the department, affirmed the decision of the contracting officer.

June 1 and 10, 1936, plaintiff filed a written claim with the contracting officer for an extension of time for the completion of the work and for an increase of the unit contract price because, it alleged, the materials encountered in Area 3 differed from those represented by defendant, in that they were "soupy" and difficult to excavate and deposit on the

disposal area. After an investigation of the claim the contracting officer denied it on June 22, 1936, and notified plaintiff of his findings and decision which were in part as follows:

> (a) That the material in Area No. 3, from approximately station 13+30 to 15+50, in the first cut adjacent to the shore, consisted of a mixture of sand, gravel, fire clay, mud and boulders.
>
> (b) That on June 8, 1936, your dredge *Pelican* dug and cast 3361 cubic yards (place measurement) of material up on the bank.
>
> (c) That due to the methods used in casting this large volume of freshly dug material on the shore, making no provision for drainage of the water in the material, you mired your dragline and bulldozer in this freshly dug material.
>
> (d) That on inspection made June 15, 1936, the material placed in the disposal area was found to be well dried out, compact and did support the weight of your equipment without difficulty.
>
> (e) That this material, if properly placed and provision made for draining the water cast by the dredge on the freshly deposited material, can be used in the disposal areas as shown on the drawings.
>
> I find that the conditions encountered in this Area do not differ materially from those shown on the drawings or indicated in the specifications, and that with proper supervision and care, no particular difficulties should be encountered in trucking over the fill and depositing it in accordance with the specifications and drawings. Therefore, no extension of time for the completion of the work can be granted and the unit contract price for the work can not be increased.

Plaintiff appealed from this decision to the Chief of Engineers on July 10 and 25, 1936, and on October 13, 1936, the Acting Chief of Engineers affirmed the decision of the contracting officer and advised plaintiff as follows:

> With respect to delay in dragline operations claimed to have been occasioned due to soft material in the fill, it is considered that this condition resulted from your failure to provide adequate drainage in the fill. The record discloses that the dredge *Pelican*, prior to its breakdown, was engaged in casting material to a point in the river where it could be reached by a dragline operator from the bank. The dragline scooped the ma-

terial, together with large quantities of water, and this wet material was placed in thick layers in the fill without any provision for drainage of excess water.

In view of the foregoing, I find that the facts fail to present subsurface or latent conditions at the site differing materially from those shown on the drawings or represented in the specifications, as contemplated by Article 4 of the contract, and that there is no basis for increasing the contract unit prices or extending the time for the completion of the work.

October 31, 1936, the Chief of Engineers, after considering plaintiff's appeal of July 10, 1936, also affirmed the above findings and decisions and advised plaintiff as follows:

> After a careful review of your claim for an adjustment because of the presence of soft material, I am of the opinion that the facts do not warrant a finding of changed conditions as contemplated by Article 4 of the contract.

June 12, 1936, plaintiff made written application to the contracting officer requesting a 5-day extension of time and additional compensation on account of the breaking of the *Pelican's* main hoist drum. The contracting officer denied the claim June 30, 1936, and advised plaintiff of his findings as follows:

> I have investigated your claims and my findings of the facts are as follows:
>
> (a) That on June 9, 1936, the hoist drum of the dredge *Pelican* broke and the dredge was idle until 9:00 P. M. on June 15, 1936, while you were awaiting parts and making repairs.
>
> (b) That an inspection of the hoist drum showed that the metal was worn thin, thus weakening the drum.
>
> (c) That upon investigation of the shale encountered on June 11, 1936, it was disclosed that the shale was loose and not in its natural state and was only encountered in a small quantity and you were not delayed because you encountered shale.
>
> I find that since paragraph 1–21 of the specifications states that the contractor shall make provisions for emergency repairs an extension in time cannot be granted because of delay due to making these repairs. I also find that you were not materially delayed because your dredge encountered shale and an extension in time for the above reason cannot be granted under Article 9 of the contract.

July 6, 1936 plaintiff appealed from this decision to the Chief of Engineers, who affirmed the decision of the contracting officer on October 13, 1936.

12. The findings of fact and decisions of the contracting officer and the Chief of Engineers, acting for the head of the department, were not arbitrary or grossly erroneous in denying plaintiff's claims for additional time and increased compensation.

The conditions and materials encountered at the site of the work did not differ materially from those shown on the drawings or represented in the specifications.

13. In its petition plaintiff claims that because the materials encountered differed from those represented by defendant, it suffered increased costs and damages to the extent of $90,345.89, and a resultant delay in the performance of the work for which it was erroneously assessed liquidated damages in the sum of $1,690.00, its total claim being $92,025.89.

Plaintiff's revised claim now urged for losses and damages in the performance of the contract and remission of liquidated damages is $75,528.35, as follows:

Direct operative costs	$45, 261. 64
Direct specific costs	30, 378. 41
Use of machinery and equipment	37, 301. 75
Liquidated damages withheld	1, 680. 00
	114, 621. 80
General and administrative expenses based on contract cost	16, 941. 27
	131, 563. 07
Less amount received from the United States	56, 034. 72
	75, 528. 35

14. Plaintiff excavated 157,288 cubic yards of sand, gravel, rock and boulders less than one cubic yard in size; 392 cubic yards of rock and boulders between 1 and 3 cubic yards in size, and 201 cubic yards of rock and boulders over 3 cubic yards in size, for all of which it has been paid the contract prices. Performance of the entire contract of July 29, 1935, excluding overhead and profit, cost plaintiff at least $77,838.70. The contract price under the July 29, 1935, contract was $48,830.96. Plaintiff recovered $321.93 of its total performance costs of $77,838.70 from the sale of

scrap and refunds on insurance. Plaintiff sustained a loss on the contract in suit of $28,685.81.

The cost of performance in excess of the contract price was not the result of any act or misrepresentation by defendant, and none of the delay in completing the work called for by the contract, beyond the contract time as extended was caused by defendant.

The court decided that the plaintiff was not entitled to recover.

Jones, *Judge*, delivered the opinion of the court:

Plaintiff by contract with the Government dated July 29, 1935, undertook to dredge a temporary channel in a pool below the site of a proposed lock and dam in the Allegheny River near Rimerton, Pennsylvania. The contract called for the excavation of a channel approximately 4,100 feet in length, varying in width from 100 to 150 feet, the average width being about 105 feet, and for the removal and disposal of the material lying above an elevation of 790 feet within the specified area, which would require the removal and disposal of about 162,000 cubic yards of material.

The contract rate was .295 per cubic yard, the total contract price being approximately $47,900.00. The channel was to be dredged parallel with the left bank when looking down stream; there were three other channels to be dredged alongside the channel involved in this action, thus making a total channel 500 feet wide, but these were provided for by separate contracts and are not involved in this suit.

The Schedule of Conditions accompanying the invitation for bids contained the following:

> It is expected that bidders will visit the site of the work and acquaint themselves with all information concerning the nature of the materials that will be encountered in the river bed and all other conditions likely to affect the prosecution of the work. Core borings from the vicinity of the proposed Lock and Dam No. 9, Allegheny River, are on exhibition at Lock No. 8, Allegheny River, where they may be inspected by prospective bidders. Failure to acquaint himself with all available information concerning these conditions will

> not relieve the successful bidder from assuming all responsibility for estimating the difficulties and cost of successfully performing the complete work as required.

Before advertising for bids defendant caused certain test pits to be dug under the supervision of one of its engineers. The materials encountered were recorded on a test pit data table. Three of these tests, Nos. 14, 17, and 19, were inside the instant contract area.

Before submitting its bid, plaintiff's president visited the contract area and examined the materials taken from test pits 14, 17, and 19. He examined the walls of these pits; he also examined the core borings which had been drilled in the vicinity, and which disclosed materials similar to those shown in the test pit data table. Plaintiff's engineer also inspected the operations of the dredging company which at that time was dredging for the Phillips Oil and Gas Company a pipe line trench across the entire river and which crossed the contract area. The engineer made a report to plaintiff's president before the bid was submitted.

The specifications required the plaintiff to prosecute the work by excavating not less than 25,000 cubic yards during the first month after the date fixed for commencement, and an average of not less than 40,000 cubic yards per month thereafter. Under Change Order No. 1 the period for completion was extended 23 days, and under Change Order No. 2 the contract price was increased $250.00 which, with later adjustments, increased the contract price to $48,830.96.

Upon completion of the contract August 15, 1936, plaintiff was assessed liquidated damages under Article 9 of the contract and Paragraph 1-03 of the specifications at the rate of $20.00 per day for 84 days, a total of $1,680.00.

Plaintiff alleges that instead of materials such as had been indicated by the test pit data table, it discovered that the area to be excavated consisted of cemented sand, gravel, and rock, a very difficult subsurface material to excavate, and that instead of being able to do the work with the Sauerman 2½ cubic-yard scraper bucket which it had expected to use, it found it necessary to provide and deliver a Diesel dragline and finally a 3½ cubic-yard dipper dredge. It claimed that as a result of the difference between the materials dis-

covered and those shown on the tables, it suffered damages in the amount of $92,025.89, including $1,680.00 liquidated damages which it asserts were erroneously assessed. Plaintiff later reduced its claim to $75,528.35.

The record as a whole fails to sustain plaintiff's allegations and does not justify its claim for damages.

The materials encountered were not substantially different from those indicated in the specifications and the borings in the contract area—gravel, sand, small boulders, one-man stones, sandstone, and some clay. This conclusion is strengthened by plaintiff's day by day notations which were made on its daily bulletins that were kept as the work progressed and which were entered at the time.

The daily report for June 29, 1936, contains this entry:

> *Pelican.*—Dredging along right channel line #3 area between stations 11 plus 10 & 10 plus 38. Dredging hard. Material sand, gravel and some boulders. *Dug thru test hole #19 and found material practically as shown on plans.* [Italics supplied.]

The notations on the daily bulletins make no mention of the finding of any cemented material.

The materials were so near the same as those indicated on the specifications, borings and other data available to plaintiff that they cannot possibly form the basis for a cause of action based upon alleged misrepresentation. *C. W. Blakeslee and Sons, Inc.*, v. *United States*, 89 C. Cls., 226, 246.

Plaintiff's claim for damages to machinery is not sustained by the evidence. The K–55 Link-belt dragline with which the work was begun was in bad shape when it arrived on the job, and would not do the work properly. The dipper dredge *Pelican* with which most of the work was done was more than 20 years old and was not in good operating condition when it arrived on the project. The hull leaked badly, the boiler tubes leaked, the grate bars were defective and the fire door was broken off.

Even if plaintiff were otherwise entitled to recover there is no proper proof by which the amount of the damages can be measured. The plaintiff's proof of damages is con-

fined substantially to an effort to show the difference between the contract price and the cost to which plaintiff was put in completing the contract.

It is overwhelmingly clear from figures submitted by competitive bidders and the prior estimates by Government engineers that plaintiff's bid was too low. The lowest competing bidders had submitted bids of .52 and .53 per cubic yard. The Government engineers had estimated that a fair price would be .54 per cubic yard. Plaintiff's bid was .295 per cubic yard. Manifestly, if plaintiff had established a legal right to recover, its measure of damages would not be the difference in the contract price and the cost of completion, but the difference in the cost of completion, and what the cost would have been had the materials been as represented. *Levering & Garrigues Co.* v. *The United States*, 73 C. Cls., 566, 575. We quote:

> The fact the plaintiff estimated it could do the piling work for a certain amount is not proof that it could have done the work for that amount except for the sea-wall obstruction. Its estimate as to what the work would cost may have been right or may have been wrong. It is incumbent on the plaintiff, before it can recover, to establish by proof what it actually cost to do the work over and above what it would have cost had the subsurface conditions at the site been such as the plaintiff had a right, from the representations made by the defendant, to assume they were. This the plaintiff failed to do.

The evidence in the case does not justify plaintiff's claim for damages on the basis of the rental value of the equipment which it furnished. The rental value is not satisfactorily shown in the evidence. It was plaintiff's own equipment. Neither the delay nor the damages to the equipment were shown to have been the fault of the defendant.

Plaintiff is not entitled to the remission of the amount assessed as liquidated damages. Its claim was presented to the proper authorities and denied. Their action was neither arbitrary nor capricious.[1]

[1] *United States* v. *Gleason*, 175 U. S. 588; *McShain Company, Inc.*, v. *The United States*, 83 C. Cls. 405, 409.

There is no doubt that plaintiff misjudged the extent of the work required and the difficulties that would naturally be encountered, but the data was made available to all bidders, an opportunity was given for personal investigation, no material facts were withheld, and no material misrepresentations were made by the defendant. With the facts before it, the plaintiff submitted its bid and voluntarily undertook the obligations of the contract. We know of no proper way by which plaintiff may escape the legal consequences of its act.

Judgment is entered for the defendant. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

ORDNANCE ENGINEERING CORPORATION v. THE UNITED STATES

[No. 42876. Decided June 1, 1942]

On the Proofs

Patents; infringement of patents for illuminating shells; compensation for infringement and use by the Government for the period January 1, 1929, to May 27, 1936.—Judgment upon an accounting for the period from January 1, 1929, to May 27, 1936, following the determination and judgment in Case No. 34680 (84 C. Cls. 1) and the decisions and opinions of the court on the questions of validity and infringement by the Government of the patents in suit, 68 C. Cls. 301 and 73 C. Cls. 379.

The Reporter's statement of the case:

Mr. Eugene V. Myers and *Mr. George R. Shields* for the plaintiff.

Mr. Franklin G. Manley and *Messrs. King & King* were on the brief.

Mr. C. P. Goepel and *Mr. H. L. Godfrey*, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Mr. J. F. Mothershead was on the brief.

This case involves an accounting for the purpose of the determination of reasonable and entire compensation for the use of plaintiff's patents for the period January 1, 1929, to May 27, 1936.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of New Jersey with offices at 170 Broadway, New York City.

2. Suit was instituted upon four United States patents numbered 1,305,186, 1,305,187, 1,305,188, and 1,381,445, owned by plaintiff company, entitled Ordnance Engineering Co. v. United States, No. 34680, and, after a hearing on the merits, was decided in favor of the plaintiff company. See 68 C. Cls. 301 and 73 C. Cls. 379.

Reference to a Commissioner was made to report on the liability of the United States upon an accounting proceeding and a decision upon said accounting was reported in 84 C. Cls. 1.

3. In case No. 34680, the court found patents Nos. 1,305,-186 and 1,305,188 valid and infringed but held that as to patents Nos. 1,305,187 and 1,381,445 the United States had a free license. Therefore, in the present suit only the infringement of patents Nos. 1,305,186 and 1,305,188 is included in the accounting.

Both patents in suit expired on May 26, 1936, and the present period of accounting therefore begins January 1, 1929, and runs until May 26, 1936. The former accounting period ended December 31, 1928. See 84 C. Cls. 1.

4. Plaintiff has never licensed others under the patents here involved, so there is no established royalty to serve as a measure of damages.

5. By a stipulation filed January 11, 1940, the parties agreed that the "testimony and exhibits of both sides in case No. 34680 so far as competent, material, and relevant to the issues herein may be ereferred to by either party."

6. The rule to be applied in the present case is the same rule that the court adopted in case No. 34680. That is to

say, the same elements of cost of production there approved will here be used as a basis of cost. See finding 23 in former case No. 34680.

7. Included in this finding 23 are: (1) labor; (2) material; (3) all factory overhead for the entire period, but excluding (a) cost of shell bodies, (b) cost of time fuses, and (c) general Navy administrative expense not connected with the manufacture of star shells.

As to the "Navy general administration expense not connected with the manufacture of star shells," it appears from the total $4,075,239.36 that there was excluded (1) "military" expense (see enclosure A, column 11 in case No. 34680) from the beginning of the first accounting period to June 30, 1925, in the amount of $147,413.54; and (2) "Officers and Enlisted Men." (See enclosures A and B, Column 8, in case No. 34680, from July 1, 1925, to December 31, 1928, in the amount of $69,463.35.) In the period now under review the heading "military" expense was not set up at the Baldwin plant (see plaintiff's exhibits 1, 2, and 4), and so is not available as an element of expense in this accounting.

8. In the former accounting, the court also excluded the cost of time fuses not manufactured at Baldwin plant (see finding 19, in case No. 34680), but no such item appears in the present accounting.

The item "Pay and Allowances" appearing in plaintiff's exhibit 2 is not included as a manufacturing cost at the Baldwin plant in this case since it was excluded in first accounting in case No. 34680. (See finding 23.) This amount is claimed by plaintiff to be $143,954.52. (See column 4 headed Bureau, plaintiff's exhibit 3.)

9. In response to a Call made by plaintiff on December 3, 1937, the Navy Department on August 18, 1938, submitted a schedule of star shells manufactured at the Baldwin, L. I., plant for the period January 1, 1929, down to and including May 31, 1936. The inclusion of the whole month of May in the schedule was a result of the method used at Baldwin where overhead costs were prepared on a monthly basis. This response was received as plaintiff's exhibit No. 1.

Schedule No. 1 is reproduced herewith and made a part of this finding:

SCHEDULE #1.—*Total number of each size of Star Shell made at the Baldwin, L. I., plant, for the period January 1, 1929, to May 27, 1936 (May 31, 1936), Built to Operate by Rear Ejection of the Star and Parachute from the Shell Body*

Columns (sizes)	(1) Manufactured for Service Use	(2) Ballistic Shells	(3) Experimental Shells	(4) Total Sum of 2 & 3	(5) Total Number Made
3-inch	51, 175	780	98	878	52, 053
4-inch	7, 834	120	85	205	8, 039
4-inch*	520	37	15	52	572
5-inch	58, 397	2, 001	540	2, 541	60, 938
6-inch	95	5	15	20	115
6-inch*	620	15	15	30	650
155 MM	200	20	----------	20	220
Total	118, 841	2, 978	768	3, 746	122, 587

NOTE.—All items marked with (*) refer to shells made for others than United States.

NOTE.—Because overhead costs were originally prepared on monthly basis, it was found impracticable to prepare statements of shells produced and manufacturing costs to May 27, 1936, only. Therefore, the shells completed during the entire month of May 1936 are included in this schedule, and costs for the entire month are included in other schedules prepared in compliance with the Order of the Court of Claims.

10. The court in Ordnance Engineering Company v. The United States, No. 34680, excluded from consideration ballistic and experimental shells so that for the purposes of this accounting the same deduction is made.

Total number of shells manufactured by the United States	122, 587
Total number of experimental and ballistic shells manufactured by the United States	3, 746
Total number of shells subject to royalty	118, 841

11. The plaintiff's Call on the Navy Department dated December 3, 1937, also requested detailed information concerning the manufacture and cost of star shells at the Baldwin Plant, which reply appears as plaintiff's exhibit No. 1.

Schedule 5 of the reply to Call sets forth the total of 122,587 star shells at a cost of $1,624,348.17. Of the total star shells manufactured there were: 2,978 ballistic shells costing $43,851.18 and 768 experimental shells costing $12,623.40.

12. There were 118,841 regular service shells manufactured during this period of accounting costing $1,567,873.59 as follows:

COSTS OF STAR SHELL BY SIZES AND YEARS—REGULAR SERVICE SHELL

Calendar years	3-inch	4-inch	5-inch	6-inch	155-mm.	Total
1929	$95,286.07		$149,530.30	$22,145.63		$266,962.00
1930			293,735.85			293,735.85
1931	25,290.85	$20,510.99	182,737.46			228,539.30
1932	96,192.89	71,694.18				167,887.07
1933	45,164.73	13,618.56	104,073.97			162,857.26
1934			182,783.24			182,783.24
1935	115,378.54		49,213.37	1,899.53	$8,693.76	175,185.20
1/1-5/31, 1936	62,729.87		27,193.80			89,923.67
Total	440,042.95	105,823.73	989,267.99	24,045.16	8,693.76	1,567,873.59

13. Plaintiff made a second Call on the Navy Department February 6, 1939, for the number and cost of all shell bodies, nose pieces, and base plugs for use in the production of star shells during the period January 1, 1929, to May 26, 1936. There were purchased and delivered to the Baldwin Plant 123,847 shell bodies at a total cost of $790,283.49. Of the total shell bodies received, there were 1,260 unused and remaining on hand at the end of this accounting period. (Plaintiff's exhibit 4, statement 1, Navy Return filed August 3, 1939.)

14. These 1,260 shells were not completed or operable (see plaintiff's exhibit 4, statement 1) and the evidence fails to show the state of completion of the 1,260 shells. They are not considered as "manufactured" within the purview of this accounting.

15. The total cost of production of star shells in case No. 34680 as itemized by reference to findings 17 and 23 is as follows:

1. Enclosures A. B, and D, Column 3, "Illuminating Projectiles, Cost of Production, Title Z," return of Navy to Calls, filed March 27, 1930, and November 29, 1930, factory cost for all star shells including shell bodies, but excluding part of factory overhead. See finding 17, #34680	$5,927,501.90
2. To the above figure is added "Shop and General Expense" titles G and S, Column 5, in Enclosures A and B from July 1, '25, to December 1, '28, #34680	382,527.43

Reporter's Statement of the Case

3. Depreciation from July 1, '25, to December 1, '28, id added. Enclosures A and C, #34680	$46,447.38
4. Disability, Title G, Enclosures A and C, Column 10, #34680, July 1, '25, to December 30, '25	84.65
Disability extended by plaintiff and allowed by the Court, from Dec. 30, '25, to December 31, '28	1,924.44
Total cost of production, including all factory overhead	6,358,485.80
16. From this cost of production, pursuant to the rule set out in finding 23, the following deductions are made:	
1. Cost of shell bodies, see finding 21, #34680	2,121,537.22
Total cost of all shells as per finding 8, #34680	4,236,948.58
2. Less cost shells not held to infringe, 7,425 experimental and ballistic shells, finding 6, #34680—7,425 @ $21.18	157,261.50
and 197, 3" and 4" shells made and used prior to May 27, 1919, finding 7, #34680—197 @ $21.18	4,172.46
Total deduction for noninfringing shells	161,433.96
3. Factory cost for 192,427 regular service shells (finding 23 in #34680)	4,075,514.62

The total factory cost for 192,427 shells as shown in this finding, to wit, $4,075,514.62, does not correspond to the cost figure set forth in finding 23 of case No. 34680, which was $4,075,239.36, the difference being $275.26. It is, however, a fact that the average cost per shell of $21.18 as shown in finding 24 in case No. 34680 if multiplied by the number of infringing shells as found in finding 23, case No. 34680, which was 192,427, gives a result of $4,075,603.86, which is also in excess of the total of $4,075,239.36 by the sum of $364.50.

16. The purpose of the detailed resolution of the figures in former case No. 34680 is to establish from the records in that case the theory the court adopted in arriving at its conclusion of costs and royalty allowances. It is clear that the rule above set forth was applied to the figures and data submitted in case No. 34680 and that discrepancies or differences in the calculations do not disturb the fact of the

application of the accounting factors announced in finding 23, case No. 34680.

17. A fair and reasonable royalty for the star shells manufactured during this accounting period for the four patents owned by the plaintiff, to wit, Nos. 1,305,186, 1,305,187, 1,305,188, and 1,381,445, is 7½ percent of defendant's factory cost stated in finding 12 herein, or $1,567,873.59, which amounts to $117,590.52.

18. A fair and reasonable apportionment of royalty between the patents specified in finding 3 is 85 percent to patent No. 1,305,186 and 5 percent to each of the others.

19. A fair and reasonable deduction for the free license of the defendant under patents Nos. 1,305,187 and 1,381,445 is 10 percent of $117,590.52 equaling $11,759.05.

20. All of the star shells manufactured during the present accounting period comprised the single type parachute and none embodied the multiple type parachute. See plaintiff's exhibit No. 1, schedule 2.

21. A fair and reasonable apportionment of the royalty to the multiple parachute claims, i. e., claims 1, 2, 3, 4, and 6 of patent No. 1,305,186 is 5 percent of the royalty for the entire group of patents. This apportionment is required because during the period here involved the cost of single type parachute is included in the total infringing cost as set forth in finding 12, to wit, $1,567,873.59.

22. This 5-percent royalty of the entire group of patents is $5,879.53.

23. The reasonable and entire compensation for infringement complained of is a reasonable royalty of $117,590.52,

1. Less deductions, licenses under patents 1,305,187 and 1,381,445	$11, 759. 05	
2. For shell not embodying multiple parachutes	5, 879. 53	
		$17, 638. 58
		99, 951. 94

24. A reasonable amount to be added to the compensation of $99,951.94, found in the preceding finding, is $17,890.09

measured by interest at 5 percent per annum from January 1, 1929 to May 31, 1936, as set forth in the table below:

Calendar years manufactured	Number of shells	Factory cost	Annual allocation	Interest to May 31, '36 @ 5%
1929	21,803	$266,962.00	$17,018.83	$5,460.21
1930	17,229	293,735.85	18,725.66	5,071.53
1931	14,567	228,539.30	14,569.38	3,217.40
1932	17,100	167,887.07	10,702.80	1,828.39
1933	14,084	162,857.26	10.382.15	1,254.51
1934	9,717	182,783.24	11,652.43	825.38
1935	14,491	175,185.20	11,168.06	232.67
Jan.-May 1936	9,850	89,923.67	5,732.63	----------
Total	118,841	1,567,873.59	99,951.94	17,890.09

A further sum to be added to the compensation of $99,-951.94, set forth in finding 23, from May 31, 1936, to date of judgment, June 1, 1942, in order to make entire compensation is $29,985.58.

25. The method of computing interest to May 31, 1936, is based upon calendar year periods and fractions thereof and the proportion of yearly interest to the whole sum in yearly accruals is shown in the following table:

BASIS FOR INTEREST COMPUTATION TO 5/31/36

			@ 5%
1929 from	1/1/30—6 5/12	yrs. or	32.08 1/3 %
1930 from	1/1/31—5 5/12	yrs. or	27.08 1/3 %
1931 from	1/1/32—4 5/12	yrs. or	22.08 1/3 %
1932 from	1/1/33—3 5/12	yrs. or	17.08 1/3 %
1933 from	1/1/34—2 5/12	yrs. or	12.08 1/3 %
1934 from	1/1/35—1 5/12	yrs. or	7.08 1/3 %
1935 from	1/1/36— 5/12	yrs. or	2.08 1/3 %

ANALYSIS OF PLAINTIFF'S COMPUTATIONS IN ITS EXHIBITS 2 AND 3

26. The only evidence of cost data entered in this case, other than the returns to Calls filed by the Navy Department and referred to in preceding findings, is plaintiff's exhibit No. 2 and plaintiff's exhibit No. 3.

27. Plaintiff's exhibit No. 2 consists of summary statements of expenditures copied from the annual reports of the Paymaster General of the Navy for the fiscal years 1929 to 1936, inclusive.

28. Plaintiff's exhibit No. 2 does not follow the rule of this court in No. 34680 in that these statements cover fiscal years including a period of six months prior to the infringing period and one month after the infringing period. The expenditures reported include all costs at the Baldwin plant of whatever nature and are therefore not subject to the application of the rule in case No. 34680 in that figures are not segregated as to costs between star shells, shell bodies, or cost of work performed at the Baldwin plant other than the manufacture of star shells.

29. Plaintiff's exhibit No. 3 was compiled by plaintiff to show:

First, columns 1 and 2 as comparisons between the costs found in case No. 34680 (column 1) as compared with the annual reports of expenditures by the Navy Department at the Baldwin plant for the first accounting period from the beginning of operations to December 31, 1928 (column 2); and

Second, comparable figures in the annual reports of the Paymaster General for the fiscal years 1929 to 1936, inclusive (column 3), which figures are adjusted in columns 4 and 5 to the infringing period in this case according to the contentions of the plaintiff.

Column 1 of plaintiff's exhibit 3 does not follow the rule in the former case No. 34680 in that a deduction of $2,190,-055.33 is made from material costs for shell bodies, whereas the actual deduction applied by the court in No. 34680 was $2,121,537.22 (finding 21, No. 34680).

Column 2 of plaintiff's exhibit No. 3 is not adjusted to comparable costs in column 1 in that a deduction of $561,-137.44 was made as the cost of fuses, whereas such costs were not included in the Bureau report (finding 19, No. 34680). Costs of shell bodies deducted in column 2 are shown at $2,203,540.22, whereas the actual deduction for shell bodies in case No. 34680 was $2,121,537.22 (finding 21, No. 34680). There were no deductions in column 2 for "Navy general administrative expense not connected with the manufacture of star shells" (finding 23, No. 34680) which included the following items:

"Military" from the beginning of the first accounting period to June 30, 1925 (Industrial Period of Navy accounting) $147,413.54
"Officers and enlisted men" for the period July 1, 1925, to December 31, 1928 (Non-industrial Period of Navy accounting) 69,463.35
"Models, tests, etc.," costs for the entire period of manufacture during the first accounting period (Nov. 1918 to Dec. 31, 1928) 133,420.85

(See finding above covering the rule in case No. 34680.)

30. Column 3 of plaintiff's exhibit No. 3 purports to be a summary of the annual reports (plaintiff's exhibit No. 2) for the fiscal years covering the period July 1, 1928, to June 30, 1936. The first figure in column 3 is opposite the caption "Labor" in the amount of $1,297,305.51, whereas the total labor costs as contained in plaintiff's exhibit No. 2 amount to $1,315,359.85. The grand total amount shown in column 3 is $3,054,523.02, whereas the total expenditures summarized in the annual reports amount to $3,093,323.75.

Column 4 of plaintiff's exhibit No. 3 purports to be the result of adjustments applied to the figures shown in column 3 to reduce such figures to the rule applied in the previous accounting under No. 34680 for the purpose of fixing a reasonable royalty. The adjustments applied, however, do not complete this operation in that the adjustments have been made only to reduce the costs to the infringing period, and not the *infringing* costs during the infringing period.

31. The amount of costs for labor deducted to cover the month of June 1936, outside of the infringing period, is $16,655.02 (Col. 4 of plaintiff's exhibit No. 3), whereas the actual labor applied at the Baldwin plant in June 1936 was $18,331.86 (statement 4-A, plaintiff's exhibit No. 4, 3d to last column, "June 1936"). An adjustment for pay and allowances is made for the six months of 1928 in the amount of $16,101.66 (Col. 4, plaintiff's exhibit No. 3), whereas one-half of the amount shown for pay and allowances for the fiscal year 1929 in plaintiff's exhibit No. 2 is $10,201.25.

In the adjustments applied against total materials in column 3 in the amount of $1,595,389.78 to arrive at the total $1,431,518.56 (Col. 4, plaintiff's exhibit No. 3) deductions were made for the month of June (to wit: $5,811.13 and

$6,071.79) making a total adjustment of material for the month of June 1936 in the amount of $11,882.92 (Col. 4, plaintiff's exhibit No. 3), whereas the total material costs at the Baldwin plant for the month of June 1936 were $27,-264.98 (statement 4–A, plaintiff's exhibit No. 4, second to last column opposite the caption "June 1936").

32. The result obtained in the amount of $2,761,875.86 (Col. 4, plaintiff's exhibit No. 3) is not a figure comparable to the result obtained in finding 23 of case No. 34680 in that no adjustments were applied by the plaintiff to cover non-infringing costs as set forth in the rule of case No. 34680, finding 15 above.

33. To apply the rule of case No. 34680 to plaintiff's exhibit No. 2, the following result is obtained:

All costs in Annual Reports for Fiscal Years 1929 to 1936, incl.		$3,093,323.75
(1) Less costs during noninfringing period:		
All costs in Monthly Reports July–December 1928 (Statement 4–A, Plaintiff's Exhibit 4)	$246,236.01	
All costs for month of June 1936 (Statement 4–A)	45,596.84	
		291,832.85
Balance of all costs (except Pay and Allowances) for the infringing period January 1, 1929, to May 31, 1936		2,801,490.90
(2) Less noninfringing costs during the infringing period:		
(a) Shell bodies cost—(Statement 1, Plaintiff's Exhibit 4, 2nd Return)	$790,283.49	
(b) Cost of work other than star shell (Statement 3, Plaintiff's Exhibit 4, 2nd Return)	250,707.98	
(c) Pay & Allowances (Plaintiff's Exhibit 2)	161,827.73	
(d) Inventory of Materials not applied toward the manufacture of Star Shell (Summary of Statements, Plaintiff's Exhibit 4, 2nd Return)	22,745.41	
		1,225,564.61

Balance of Comparable Infringing Costs From the Annual Reports during the Infringing Period	$1,575,926.20
(3) Add depreciation not Reported as an Element of Cost in Navy Accounting (Summary of Statements, Plaintiff's Exhibit 4, 2nd Return)	60,530.35
Total Cost from Annual Reports Comparable to Star Shell Costs	1,636,456.64

34. In comparing the result obtained above in the amount of $1,636,456.64 with the cost of star shells reported in response to the plaintiff's first call filed August 19, 1938, in the amount of $1,624,348.17 (schedules 4 and 5, plaintiff's exhibit No. 1), there appears a difference of $12,108.47 which is not accounted for by witnesses on either side.

By analyzing plaintiff's exhibit No. 2 (annual reports by fiscal years) and comparing the same with comparable accounting titles in the Baldwin Monthly Reports of Expenditures (Statement 4–a, Plaintiff's Exhibit No. 4) furnished in response to the plaintiff's second call February 6, 1939, this difference is found to be contained in the following accounts:

(a) Noninfringing expenditures (Excluded by the Court in No. 34680):			
V–Model, tests, etc	Overage+	$10,577.98	
R–Plant additions	Under —	694.27	
Proceeds of Sales, Condemned Sales, Cash Sales	Overage+	50.71	
			$9,934.42
(b) Other costs contained in production and overhead accounts:			
Z–18 and 19, Production accounts	Overage+	1,528.67	
S–Maintenance (or overhead) accounts	Overage+	645.38	
			2,174.05
Total difference as above			12,108.47

There is no evidence to indicate that any amount of the $2,174.05 is applicable to star-shell costs under the rule of the court in case No. 34680.

The court decided that the plaintiff was entitled to recover $99,951.94, together with an additional amount as a part of entire compensation measured by interest at 5 per-

cent per annum in the amount of $17,890.09 to May 31, 1936 and $29,985.58, likewise measured on $99,951.94 from May 31, 1936, to date of judgment, June 1, 1942, totaling $147,-827.61, together with interest as a part of "entire compensation" on $99,951.94 from June 1, 1942, until paid.

LITTLETON, *Judge*, delivered the opinion of the court:

The present case involves only an accounting for the determination of reasonable and entire compensation during the period January 1, 1929, to May 27, 1936, for the infringement or unauthorized use by the defendant of certain patents of the plaintiff. Compensation was determined and judgment therefor entered, 84 C. Cls. 1, from the issuance of the patents May 27, 1919, to December 31, 1928, the end of the former accounting period.

Certain of the claims of the patents in suit were held by the court to be valid and infringed in 68 C. Cls. 301 and 73 C. Cls. 379. Thereupon the case was referred to a commissioner of the court for the taking of proof and the making of a report on accounting for the determination of the reasonable and entire compensation for the use of its patents by the government. The accounting period with respect to which proof was introduced in the former case extended to December 31, 1928.

The patents involved were used by the government without the consent or license of the plaintiff continuously from the date of their issuance to date of expiration on May 27, 1936; and the present suit, instituted December 28, 1934, is for an accounting to recover compensation for the remaining term of the patents subsequent to December 31, 1928, the right to which was determined and adjudged in the opinion, *supra*, in the former case, No. 34680.

In the former case the court, upon consideration of the evidence submitted and the contention of the parties, determined and held that the compensation to which plaintiff was entitled for the use of its inventions was a reasonable royalty measured by a percentage of the appropriate factory cost of manufacturing the infringing articles and, upon all the facts and circumstances, the court established and

adjudged that a fair and reasonable royalty was 7½ percent, less certain deductions, of the applicable factory cost of production of the regular service shells manufactured at the Baldwin plant. Various theories relating to damages, such as loss of profits, etc., were urged by plaintiff in the former accounting, but the court rejected them and adopted the "factory cost" as the just, fair, and equitable basis for the computation of reasonable compensation to be measured by a reasonable royalty. The court determined and adjudged that a fair and reasonable royalty from the defendant to plaintiff for the use by the former of plaintiff's inventions was 7½ percent and entered judgment for that royalty on the number of infringing shells and the applicable cost of production thereof to December 31, 1928, the end of the proof for accounting in that case. This judgment was in the principal amount of $266,400.10, together with an additional amount of $70,807.36 as a part of entire compensation measured by 6 percent interest, totaling $337,207.46.

By applying the rule adjudged and followed by the court in the former case as to the proper factory cost and as to what was a fair and reasonable royalty, both of which we think are here just and fair, the plaintiff is entitled to recover as reasonable and entire compensation the principal sum of $99,951.94 which, with a reasonable addition of $47,875.67, measured by a reasonable rate of interest to date of judgment, totals $147,827.61. We are of opinion that a reasonable rate of interest during this accounting period is 5 percent.

In the former decision of the court on accounting in case 34680, the court determined that proper factory cost to which the reasonable royalty rate should be applied included labor, materials, and factory overhead, including the cost of administering the Baldwin plant for the entire accounting period, but excluding cost of shell bodies and time fuses and further excluding all Navy Department general administration expense in connection with the manufacture of star shells. The deductions from the 7½ percent reasonable royalty were one-tenth of such royalty by reason

of the free license under two of the patents and 5 percent of such royalty as a fair and reasonable apportionment of royalty in respect to certain multiple parachute claims of one of the patents, the structures of which were used for a limited time. In the present case factory costs have likewise been determined by the same method and exclusions and deductions have been made for the same reasons, and this shows a proper factory cost of $1,567,873.59 for the 118,841 regular service shells manufactured during the present accounting period. See findings 9 to 12, inclusive. Applying this basic theory or policy of determining factory cost of production, the court found in the former case that the factory cost for the period there involved was $4,075,239.36 for 192,427 regular service shells. See finding 15. Had the accounting period in the former case extended to May 27, 1936, the expiration date of the patents, instead of ending at December 31, 1928, on the proof submitted in that case, the proper and applicable factory-cost figure of $4,075,239.36 would merely have been increased by the amount of $1,567,-873.59, as shown by finding 12 herein, and the royalty of 7½ percent there determined to be a fair and reasonable rate of royalty would merely have been applied to the sum of $5,643,112.95 instead of to the factory costs from May 1919, to December 31, 1928. Inasmuch, however, as the present accounting results from the filing of a new petition, the factory costs for the period now under consideration must be considered separately and the fair and reasonable royalty percentage applied thereto.

Plaintiff argues that inasmuch as the royalty of 7½ percent as applied to the factory cost determined in case 34680 for the period from commencement of operations in May 1919, to December 31, 1928, figured $1.35 per shell, that amount of $1.35 should be allowed for the 118,841 shells manufactured by defendant during the present period. We do not agree. The court did not determine that $1.35 per shell was the proper measure of compensation from defendant for a non-exclusive license to use the inventions. We followed the rule usually adopted by courts, as well as patentees and licensees, of arriving at

a reasonable royalty on cost of production. It is only natural to suppose that factory costs will decrease somewhat as methods of manufacture improve and production increases. Upon the record in this case we think 7½ percent is a fair and reasonable royalty for the present accounting. Under findings 1 to 25, inclusive, plaintiff is entitled to judgment for $147,827.61.

Plaintiff argues that the factory cost in the case at bar should include an item of $69,463.35, representing "pay and allowances" of officers and enlisted men of the Navy, which was an expense excluded in the former case as a part of the administration expense of the Navy and has likewise been excluded from the applicable factory costs in the present case, for the same reason, under the heading "Officers and Enlisted Men." We find no justification in the case at bar for inclusion of this item in the cost to which the royalty should be applied.

In addition to the evidence submitted as to the proper factory costs for the period involved, including the information submitted by the Navy Department pursuant to a call made by plaintiff and allowed by the court, which information was submitted and received in evidence as plaintiff's exhibit 1, and upon all of which the court has made findings of fact, Nos. 1 to 25, inclusive, the plaintiff submitted two additional exhibits, Nos. 2 and 3, in an attempt to establish higher factory costs from the annual reports of the Paymaster General of the Navy for the fiscal years 1929 to 1936, inclusive. The facts in connection with these exhibits, 2 and 3, have been analyzed in findings 26 to 34, inclusive. This analysis shows that the computations contained in these exhibits do not justify a finding of a greater factory cost than has been set forth by the court in finding 12.

Judgment will be entered in favor of plaintiff for $147,827.61 with interest on $99,951.94 from June 1, 1942, until paid at 5 percent per annum, not as interest but as a reasonable amount necessary to be added in order to make entire compensation under the rule announced in *Waite v. United States*, 282 U. S. 508, 509. It is so ordered.

Syllabus

MADDEN, *Judge;* JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THE BRIER HILL STEEL COMPANY, A CORPORATION IN DISSOLUTION, BY JOHN TOD, SURVIVING MANAGER AND TRUSTEE, v. THE UNITED STATES

[No. 44746. Decided June 1, 1942]

On the Proofs

Income tax; interest on overpayment by plaintiff credited against its liability for deficiencies for other years, where prior to credit plaintiff had transferred all its assets to another.—Where plaintiff had overpaid its taxes for 1918 and 1919 in the aggregate amount of $1,177,600.14, and had underpaid its taxes for 1916, 1917 and 1920 in the aggregate amount of $686,228.71; and where prior to final adjustment of its tax liability for these years plaintiff had sold all of its assets to another company, but had transferred to this other company an equitable interest only in the overpayment of taxes, the commissioner properly computed interest on the overpayment only to the due date of the deficiency in taxes against which they were applied, since this was all the interest to which plaintiff would have been entitled had it not sold its assets, and since its sale of them could not create a right to greater interest.

Same; interest due on overpayment by plaintiff credited against a deficiency due by another company, liability for which had been assumed by plaintiff's transferee, which was equitably entitled to the overpayment due plaintiff.—Where plaintiff was due an overpayment of taxes for the years 1918 and 1919, and where it transferred all of its assets to another, including the right to the overpayment, insofar as this could be assigned, and where plaintiff's transferee had become liable for a deficiency due by another company which had transferred all of its assets to it, the commissioner properly computed interest on the overpayment only until the due date of the taxes against which it was credited, since plaintiff's transferee was entitled in equity to the overpayment due plaintiff, and since it was legally liable for the deficiency due the third corporation.

Same; pleading and practice; issue not raised in pleadings.—An issue discussed in plaintiff's brief, but not raised in the pleadings, is not before the court for consideration.

The Reporter's statement of the case:

Mr. Paul Armitage for the plaintiff. *Messrs. George B. Furman, J. C. Argetsinger*, and *Edward Holloway* were on the briefs.

Mr. J. A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. During all the times hereinafter mentioned until August 13, 1926 The Brier Hill Steel Company (hereinafter referred to as "plaintiff") was an Ohio corporation with its principal place of business at Youngstown, Ohio. Prior to March 1, 1923 it was actively engaged in the business of manufacturing and vending iron and steel products.

The Youngstown Sheet and Tube Company is and was during all the times hereinafter mentioned an Ohio corporation with its principal place of business at Youngstown, Ohio.

2. Plaintiff reported and paid a Federal income tax of $205,077.61 for the calendar year 1916, of which $4,395.53 was refunded during 1923 and $14,568.23 during 1924. The repayment of these two amounts left a balance of $186,113.85 as the net amount which had been assessed and paid as of February 23, 1927, the date of the deficiency letter hereinafter referred to in finding 9.

3. April 10, 1918, plaintiff filed its Federal income and profits tax returns for the calendar year 1917 reporting an original tax of $7,577,560.03. In October 1919 and in October 1923 further additional taxes were assessed for 1917 in the respective amounts of $1,232,313.30 and $521,049.33. An overassessment of $71,701.21 for 1917 was allowed on January 25, 1924, leaving a net tax assessed for 1917 as of February 23, 1927 in the amount of $9,259,221.45.

4. September 15, 1919, pursuant to an extension granted by the Commissioner of Internal Revenue, hereinafter referred to as the "Commissioner," plaintiff filed a consolidated Federal income and profits tax return for itself and certain subsidiary corporations for the calendar year 1918 showing a

total Federal income and profits tax due of $1,594,442.63. That amount was timely assessed and paid during 1919 as follows:

March 19	$950, 000. 00
June 25	200, 000. 00
September 16	45, 831. 98
December 17	398, 610. 65

No adjustments had been made in this account as of February 23, 1927.

5. March 11, 1920, plaintiff filed a consolidated Federal income and profits tax return for itself and certain subsidiaries for the calendar year 1919. An original tax of $88,968.84 was timely assessed on this return and that sum was paid in installments during 1920, the last payment having been made December 14, 1920 in the amount of $22,242.21. No further adjustments had been made in this account as of February 23, 1927.

6. January 13, 1923, plaintiff and the Youngstown Sheet and Tube Company entered into a written agreement in which the former, as vendor, agreed to sell to the latter, as purchaser, its entire property and assets of every kind and nature for a specified consideration, including an agreement by the purchaser to pay, satisfy, and discharge all the debts, liabilities, and obligations of the vendor incurred prior to the date of the transfer of possession including all taxes and assessments both Federal and State.

The agreement of January 13, 1923 became effective after adoption by the stockholders of plaintiff and after ratification by the directors of the two corporations, and on March 15, 1923 the two corporations executed a formal written agreement and bill of sale providing for the transfer by plaintiff, as vendor, to the Youngstown Sheet and Tube Company, as vendee, of all its properties of every kind and nature. The formal agreement and bill of sale of March 15, 1923 contained a paragraph reading as follows:

> Nothing in this Bill of Sale and Agreement shall be construed as an attempt to assign any contract with, or any claim or demand against, the United States of America which under the laws thereof is nonassignable.

In order, however, that the full value of every such contract and claim or demand may be realized by and for the benefit of the Vendee, for the consideration aforesaid, the Vendor also hereby covenants with the Vendee that the Vendor, and if it shall be dissolved, its directors as trustees in dissolution, will, at the request and under the direction of the Vendee, in the name of the Vendor or otherwise as the Vendee shall specify and as shall be permitted by law, take all such action and do or cause to be done all such things as shall in the opinion of the Vendee be necessary or proper for, and to facilitate, the collection of the moneys due and payable, and to grow due and payable to the Vendor, in and under every such contract and in respect of every such claim or demand, if any; and also hereby covenants promptly to pay over to the Vendee all moneys collected and paid to the Vendor or to its directors as trustees as aforesaid, in respect of every such contract, claim or demand; the Vendee hereby agreeing that all costs and expenses of all actions so taken and of all things so done or caused to be done shall be borne and paid by the Vendee and that the Vendee will hold harmless the Vendor and its directors, whether acting as such or as trustees in dissolution, from all claims which may be made against them or any of them by reason of anything which it or they shall do or cause to be done at the request of the Vendee in respect of any such contract or claim or demand.

7. December 27, 1923, plaintiff filed formal claims for refund for the calendar years 1918 and 1919 in the respective amounts of $1,208,187.05 and $42,576.85. These claims were subsequently allowed in part by the Commissioner as will hereinafter appear.

8. Pursuant to the laws of the State of Ohio, plaintiff was dissolved and a certificate of dissolution placed on file with the Secretary of State August 13, 1926. At and prior to its dissolution, John Tod was a vice president, director, and manager of plaintiff. On plaintiff's dissolution, Tod became a trustee of plaintiff's remaining assets and has at all times since acted as its sole surviving manager and trustee.

9. February 23, 1927, the Commissioner, after an examination of plaintiff's returns and of its books and records, mailed to the Youngstown Sheet and Tube Company a

sixty-day letter showing proposed assessments against it as transferee of the assets of plaintiff in the aggregate amount of $959,200.83 for the years 1916 to 1922, inclusive, made up as follows:

Year	Deficiency	Overassessment
1916	$1,897.75	
1917	321,250.44	
1917	[1] 420,058.96	
1918	19,012.41	
1919	17,348.18	
1920	179,633.09	
1921	None	None
1922	None	None
Total	959,200.83	None

[1] This amount represents an outstanding assessment against the Brier Hill Steel Company for the year 1917 as indicated by the records of the office of The Collector of Internal Revenue for your district, appearing under Account No. 243-1923 list, for which a credit claim was filed by the Brier Hill Steel Company under date of March 1, 1924.

10. April 21, 1927, the Youngstown Sheet and Tube Company duly filed with the United States Board of Tax Appeals an appeal from the deficiency notice referred to in the preceding finding. Among the allegations set out in the petition were the following:

> 1 (b). On or about the 13th day of January 1923, The Youngstown Sheet and Tube Company purchased the entire property and assets of The Brier Hill Steel Company and title thereto was shortly thereafter duly passed to and vested in said The Youngstown Sheet and Tube Company. As a part of the transaction The Youngstown Sheet and Tube Company assumed and agreed to pay all the debts and liabilities of The Brier Hill Steel Company including any and all tax liabilities of the kind and character herein mentioned, and the petitioner, The Youngstown Sheet and Tube Company thereby became and now is, in all respects, successor in interest herein to The Brier Hill Steel Company and is the real party in interest herein.
>
> * * * * *
>
> 3 (b). The petitioner further says that in addition to denying the alleged deficiency claimed by the Commissioner, the petitioner claims there is due it by reason of overpayments for the years above named, approximately the sum of $605,501.79 for which claims for refund have been duly filed and all other action required

of the taxpayer with respect thereto has been taken and that such claims have been disallowed by the Commissioner and should be considered and given effect in order to determine the correct tax liability herein.

* * * * *

5 (h). By contract dated January 13, 1923, The Brier Hill Steel Company sold its entire property and assets to The Youngstown Sheet and Tube Company, petitioner herein, and on or about March 15, 1923, pursuant to such contract of sale, executed and delivered deeds, bills of sale, and other instruments of conveyance and assignment whereby its full and complete legal title to all its assets of every character whatsoever passed to and vested in the petitioner. * * *

In an answer filed June 21, 1927 the Commissioner, insofar as here material, admitted the allegations set out above in paragraphs 1 (b) and 5 (h), and denied the allegations in paragraph 3 (b).

11. Thereafter, in accordance with the then customary practice, the controversy in the Board mentioned in the preceding finding was referred to the Special Advisory Committee of the Office of the Commissioner, where it was associated with five other pending appeals and related cases which had been similarly referred, and an agreement was reached among the attorneys for the Youngstown Sheet and Tube Company, the members of the Special Advisory Committee, the General Counsel for the Bureau of Internal Revenue, and the Commissioner. That agreement was reduced to writing in the form of two separate statements, copies of which were then furnished to the attorneys for the Youngstown Sheet and Tube Company. One of these statements dated August 25, 1932 showed the liability of the Youngstown Sheet and Tube Company, as transferee of the Brier Hill Steel Company, as follows:

Year	Deficiency	Overpayment
1916	$991.10	----------
1917	534,384.71	----------
1918	None	None
1919	None	None
1920	150,852.90	----------
1921	None	None
1922	None	None
	686,228.71	----------

The other statement, likewise dated August 25, 1932, showed the deficiencies and overassessments of plaintiff and subsidiary companies, as transferor, as follows:

Year	Deficiency	Overassessment
1916	$991.10	
1917	114,793.04	
1917	[1] 419,591.67	
1918		$1,172,532.29
1919		5,067.85
1920	150,852.90	
1921	None	None
1922	None	None

[1] This amount represents an outstanding assessment against the Brier Hill Steel Company for 1917. It is a part of the additional tax, $521,049.33, assessed October 1923, and for which a credit claim was filed March 1, 1924.

Notice and demand for the foregoing outstanding assessment of $419,591.67 for 1917 had been issued by the collector on November 7, 1923.

As a result of the agreements referred to above, on September 3, 1932 the parties filed a stipulation with the Board which read as follows:

> It is hereby stipulated and agreed by and between the parties hereto by and through their respective attorneys of record, that there are unpaid Federal income and profits taxes due from the Brier Hill Steel Company for the calendar years 1916, 1917, and 1920, in the respective amounts of $991.10, $534,384.71, and $150,852.90; and that this petitioner, the Youngstown Sheet and Tube Company, is liable for the aforesaid unpaid Federal income and profits taxes, together with interest thereon as provided by law, as transferee, under Section 280 of the Revenue Act of 1926, of the aforesaid Brier Hill Steel Company.
>
> It is further stipulated and agreed that for the calendar years 1918 and 1919 there are overpayments of Federal income and profits taxes on the part of the Brier Hill Steel Company in the respective amounts of $1,172,532.29 and $5,067.85, and that by virtue thereof there is no liability on the part of this petitioner, under Section 280 of the Revenue Act of 1926, as transferee of the assets of the said Brier Hill Steel Company for either of the calendar years 1918 or 1919.

It is further stipulated and agreed that, since no liabilities for Federal income and/or profits taxes were proposed against this petitioner for the calendar years 1921 and 1922, in the sixty-day letter from which the appeal was taken, it may be dismissed insofar as it relates to the said calendar years 1921 and 1922 for lack of jurisdiction.

12. September 7, 1932, the Board entered its decision under the written stipulation referred to in the preceding finding and that order has now become final. The decision read as follows:

> Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Board on September 3, 1932, it is
>
> ORDERED AND DECIDED: That the Youngstown Sheet and Tube Company is liable at law and in equity as transferee of the Brier Hill Steel Company in respect of the tax for the years 1916, 1917, and 1920, in the respective amounts of $991.10, $534,384.71, and $150,852.90, with interest as provided by law; there is no liability at law or in equity of the above-named petitioner with respect to the tax for the years 1918 and 1919 of the Brier Hill Steel Company; and this proceeding insofar as it relates to the years 1921 and 1922 is dismissed for lack of jurisdiction.

13. March 17, 1933, the Youngstown Sheet and Tube Company, as successor to the plaintiff and other affiliated corporations, executed formal agreements as to final determination of tax liability for the years 1916 to 1922, inclusive, which were thereafter accepted and approved by the Secretary of the Treasury in accordance with the provisions of section 606 of the revenue act of 1928.

14. Pursuant to the agreements and decision mentioned in findings 11 and 12, the deficiencies found by the Board for the years 1916, 1917, and 1920 in the respective amounts of $991.10, $534,384.71, and $150,852.90, totaling $686,228.71 (together with accrued deficiency interest aggregating $272,412.81), were assessed against the Youngstown Sheet and Tube Company, as transferee of the Brier Hill Steel Company, October 8, 1932.

The deficiency interest of $272,412.81 which was assessed as set out above was computed at 6 percent from February 26, 1926 to October 8, 1932, as follows:

Year	Additional Tax	Interest
1916	$991. 10	$393. 44
1917	534, 384. 71	212, 134. 90
1920	150, 852. 90	59, 884. 47
		272, 412. 81

The assessment of this deficiency interest was abated January 6, 1933.

15. October 29, 1932, the Commissioner addressed a letter to the Brier Hill Steel Company, Youngstown Sheet and Tube Company, successor, Youngstown, Ohio, in which reference was made to the overassessments which had been determined in favor of plaintiff for the years 1918 and 1919, and information was requested, among other things, as to the corporate status of plaintiff. October 31, 1932, plaintiff, by John Tod, Vice President, replied to that letter in part as follows:

> It will thus be seen that The Brier Hill Steel Company is still a body corporate under the laws of the State of Ohio, for the purpose of collecting any assets or liquidating any liability for expense, or otherwise, that might arise and any overpayment or refund due it should be paid to The Brier Hill Steel Company, c/o John Tod, Vice President, Stambaugh Building, Youngstown, Ohio.
>
> In order, however, to facilitate the closing up of its Federal tax matters, as the Department has assessed a deficiency of $686,228.71, against The Youngstown Sheet and Tube Company, the taxpayer is willing to concede that this sum be deducted from the total refund of $1,177,600.14, provided that the net refund of $491,371.43 be immediately paid to The Brier Hill Steel Company, as indicated above, together with interest legally due The Brier Hill Steel Company. These transactions can be made concurrently through the Collector's office and the account cleared.

There was forwarded with the letter a certificate of dissolution of plaintiff and a list of the names of its officers and directors immediately preceding dissolution. The letter also stated that—

> It will be seen from this document that the corporation was dissolved and there was no change of name or successorship of it by another corporation of the same or a different name.

16. On or about December 16, 1932, the Commissioner abated the outstanding assessment against plaintiff for 1917 of $419,591.67, referred to in finding 11, and assigned the following reason for his action:

> An overassessment of income and profits taxes in favor of the above-named taxpayer is determined as follows:
>
> | | *Overassessment* |
> |---|---|
> | Year: 1917 | $419, 591. 67 |
>
> The overassessment represents a portion of a deficiency in tax assessed against this taxpayer and is determined by reason of the fact that the deficiency for the above year has been assessed against and satisfied by a transferee of the property of this taxpayer. Section 280, Revenue Act of 1926.

17. As shown in finding 14, the total deficiencies found by the Board were in the amount of $686,228.71 and were assessed October 8, 1932. October 29, 1932, the Commissioner signed a schedule of overassessments on which the overpayment of $5,067.85 for the year 1919 and $681,160.86 of the overpayment of $1,172,532.29 for 1918 (a total of $686,228.71) were allowed as credits to satisfy the deficiency assessments of October 8, 1932, of that total amount which had been assessed against the Youngstown Sheet and Tube Company, as transferee of the plaintiff, for the years 1916, 1917, and 1920. The schedule of overassessments was signed by the Deputy Commissioner and the Commissioner October 29, 1932, and forwarded to the Collector who made appropriate entries thereon showing that the overpayments had been applied in satisfaction of the deficiencies, this certificate from the Col-

lector being signed November 10, 1932. After the schedule had been returned by the Collector to the Commissioner, the Deputy Commissioner computed interest in the amount of $10,006.58 upon the credit of $681,160.86 for 1918, and in the amount of $51.23 upon the credit of $5,067.85 for 1919, and made appropriate entries upon the schedule showing these two items of interest as amounts to be paid. These interest items were subsequently deleted from that schedule of overassessments and withheld from immediate payment. They were transferred to a supplemental schedule and were later applied as a credit against a deficiency assessed against the Youngstown Sheet and Tube Company for the year 1928 as will hereinafter appear in finding 20.

18. September 20, 1934, a representative of the Youngstown Sheet and Tube Company mailed a letter to the Commissioner reading as follows:

> The taxpayer has received a notice from the Collector at Chicago of additional tax due of $34,386.86, together with interest of $26,808.09, making a total sum due of $61,194.95. This assessment results from the final closing of the tax liability of the Steel and Tube Company of America for 1918 to 1920, which was owned by the Youngstown Sheet and Tube Company and of which the Youngstown Sheet and Tube Company is held to be Transferee.
>
> As a result of the final decisions of the Board of Tax Appeals in regard to the Brier Hill Steel Company, of which the Youngstown Sheet and Tube Company is also held to be Transferee, the Department, since September 1932, has been holding a sum amounting to $491,081.03 which represents overpayments as a result of the above-mentioned settlement.
>
> Therefore, on behalf of the taxpayer, it is respectfully requested that the deficiency of $61,194.95 which is now being demanded from the Youngstown Sheet and Tube Company, be paid and absorbed by a credit of that sum against the overpayment of $491,081.03 resulting from the settlement made in regard to the Brier Hill interests of the Youngstown Sheet and Tube Company and that the Collector at Chicago be notified that such credit will be made in payment of the bills submitted to the taxpayer for the sum of $61,194.95.

It is respectfully requested that this matter be acted upon promptly so that the taxpayer will not be held in default for failure to pay the assessment within the usual ten days after notice.

19. After the receipt of the letter referred to in the preceding finding, the Commissioner on October 4, 1934 prepared and signed a supplemental schedule of overassessments (designated "4th-Supplemental") on which a further part of the overassessment (and overpayment) for 1918 in the amount of $50,747.12 and interest of $20,697.07 were allowed as credits and applied in satisfaction of certain taxes and interest assessed against the Youngstown Sheet and Tube Company, as transferee of the Steel and Tube Company of America, for the year 1920. The schedule was duly forwarded to the Collector who, after appropriate action, returned it to the Commissioner with his certificate signed October 10, 1934.

In making the credit referred to above, the Commissioner credited $34,386.86 of the overpayment against an outstanding assessment of the Steel and Tube Company of America for the calendar year 1920 and credited the remainder of the principal amount, $16,360.26 ($50,747.12 less $34,386.86), and the entire interest credit of $20,697.07 shown on the supplemental schedule of October 4, 1934 in satisfaction of interest on delinquent payments of the Steel and Tube Company of America for 1920. The following account shows how the tax liability of the Steel and Tube Company of America for 1920 was satisfied, including the credit of $34,386.86 from the overpayment of plaintiff and the computation of delinquent interest which was satisfied from the credits referred to above:

Assessments:	
Original	$988, 036. 04
Deficiency	989, 923. 63
Total	1, 977, 959. 67
Abatements	779, 325. 10
Correct tax liability	1, 198, 634. 57
Quarterly installments (¼th of total tax)	299, 658. 64

Payments

Due date	Amount due	Amount paid	When and how paid
3/15/21	$299,658.65	$54,658.65	3/15/21—Credit from 1918 tax.
		245,000.00	4/23/21—Cash.
		299,658.65	
6/15/21	299,658.64	249,018.02	6/15/21—Cash.
		50,640.62	6/15/21—Credit from 1918 tax.
		299,658.64	
9/15/21	299,658.64	185,560.28	9/15/21—Credit from 1918 tax.
		91,330.53	9/15/21—Credit from 1919 tax.
		18,405.52	9/15/21—Credit from Atlas Supply Co. tax.
		1,096.49	12/16/27—Credit from Atlas Supply Co. tax.
		3,265.82	9/19/34—Credit from 1918 interest.
		299,658.64	
12/15/21	299,658.64	220,739.49	12/15/21—Cash.
		35,751.00	9/19/34—Credit from 1918 interest.
		5,880.11	9/19/34—Credit from 1919 interest.
		2,229.84	9/19/34—Credit from Atlas Supply Co. interest.
		671.34	9/19/34—Credit from Redfield Coal Co. interest.
		[1] 34,386.86	Credit from Brier Hill Steel Co. tax.
		299,658.64	

[1] No delinquent interest has ever been collected upon this balance which was satisfied by a statutory credit made October 4, 1934, from an overpayment of tax by the Brier Hill Steel Company for the year 1918.

Delinquent interest of $37,057.33 was computed, assessed, and collected on the above account as follows:

Delinquent balance	Due date	Date paid	Interest
$1,096.49—	9/15/21	12/16/27	$411.36
3,265.82—	9/15/21	9/19/34	2,549.49
44,532.29—	12/15/21	9/19/34	34,096.48
			37,057.33

Delinquent interest assessed $37,057.33

Collected:

Credit from Brier Hill tax 16,360.26

Credit from Brier Hill interest 20,697.07

37,057.33

20. After the allowance of the credits of $681,160.86 and $50,747.12, referred to in findings 17 and 19, respectively, from the overpayment of $1,172,531.29 for 1918, there remained a balance of that overpayment of $440,624.31. De-

cember 28, 1937, the Commissioner prepared a schedule of overassessments designated "6th-Supplemental" on which appeared the remaining balance of the overpayment for 1918, $440,624.31, and interest on that balance of $495,527.30, further interest of $4,152.12 upon the overpayment of $681,160.86 which had been applied in satisfaction of deficiencies as shown in finding 17, and further interest of $253.67 on the overpayment of $5,067.85 for 1919 which likewise had been applied as a credit as shown in the same finding. The overassessments shown on the sixth supplemental schedule and which were determined to be overpayments were credited against taxes due from the Youngstown Sheet and Tube Company, as transferee of the Northwestern Iron Company, for the year 1918, the period January 1 to June 30, 1919, and the years 1924, 1926, 1927, and 1928. The sixth supplemental schedule was signed by the Acting Deputy Commissioner and the Acting Commissioner December 28, 1937.

At or about the same time the sixth supplemental schedule was prepared, another schedule (designated "5th-Supplemental") was prepared by the Commissioner on which were listed the two interest items of $10,006.58 and $51.23 which were allowed on the original schedule dated October 29, 1932, but deleted therefrom and withheld for later adjustment as shown in finding 17. The fifth supplemental schedule contained the typed signatures of the Deputy Commissioner and the Commissioner and bore the same date as the original schedule, October 29, 1932. The interest items on the fifth supplemental schedule were credited against a deficiency due from the Youngstown Sheet and Tube Company for 1928.

Both the fifth and sixth supplemental schedules were forwarded to the Collector who complied with the instructions thereon, made appropriate entries showing the items applied in full as credits, and returned the schedules to the Commissioner, his certificate thereon being signed January 7, 1938.

21. The interest items of $10,006.58 and $4,152.12 (total $14,158.70) which appeared on the fifth and sixth supplemental schedules, respectively, represented interest upon the credit of $681,160.86 from the overpayment for 1918 which

was applied in satisfaction of deficiencies for 1916, 1917, and 1920, as shown in finding 17, and was computed as follows:

Amount	Date over-paid	Tax to which credited	Due date of tax to which credited	Interest
$991.10	3/19/19	Add'l 1916	6/15/17	None
35,727.13	3/19/19	Add'l 1917	6/15/18	None
200,000.00	6/25/19	Add'l 1917	6/15/18	None
45,831.98	9/16/19	Add'l 1917	6/15/18	None
252,825.60	12/17/19	Add'l 1917	6/15/18	None
30,186.81	12/17/19	Add'l 1920	3/15/21	$2,242.09
45,239.64	12/17/19	Add'l 1920	6/15/21	4,061.03
37,713.23	12/17/19	Add'l 1920	9/15/21	3,951.11
32,645.37	12/17/19	Add'l 1920	12/15/21	3,904.47
681,160.86	----------	----------	----------	14,158.70

The interest item of $51.23 appearing on the fifth supplemental schedule and the interest item of $253.67 appearing on the sixth supplemental schedule represented interest on the overpayment of $5,067.85 for 1919. These amounts were calculated on the overpayment from December 14, 1920 to December 15, 1921. The interest item of $495,527.30 appearing on the sixth supplemental schedule was calculated on the principal sum of $440,624.31, the final balance of the overpayment for 1918, from March 19, 1919 to December 17, 1937. The interest item of $20,697.07 which appeared on the fourth supplemental schedule represented interest computed on the overpayment of $50,747.12 for 1918 allowed on the fourth supplemental schedule signed by the Commissioner October 4, 1934, and was computed as follows:

Tax overpaid	Interest computed		Interest
	From—	To—	
$34,386.86	3/19/19	12/15/21	$5,648.86
411.36	3/19/19	12/16/27	215.73
15,948.90	3/19/19	9/19/34	14,832.48
50,747.12	--------	--------	20,697.07

All items of interest mentioned above were computed at the rate of 6 percent per annum.

22. The Commissioner prepared certificates of overassessment of the various overassessments heretofore referred to and these certificates were all addressed to "Brier Hill Steel

Company, Youngstown Sheet and Tube Company (Successor), Youngstown, Ohio," which is the same manner in which the "taxpayer" was designated on the various schedules of overassessments heretofore referred to.

23. The certificate of overassessment for $50,747.12, a portion of the overassessment allowed for 1918 and appearing on the fourth supplemental schedule of overassessments signed by the Commissioner October 4, 1934, was mailed by the Commissioner October 31, 1934, and showed that the amount was arrived at in the following manner:

Income tax assessed: Original account #402298	$1, 594, 442. 63
Correct income tax liability	421, 910. 34
Overassessment	1, 172, 532. 29
Less: Amount listed for adjustment on Schedule IT: 48225	681, 160. 86
Net overassessment	491, 371. 43
To be withheld in connection with proposed deficiencies against Youngstown Sheet and Tube Company for years 1924 to 1928, inclusive	440, 624. 31
Net overassessment	50, 747. 12

This overassessment is based on the recommendation of the Special Advisory Committee.

The certificate further showed that the entire amount of the overassessment plus $20,697.07 interest had been credited against taxes for the year 1920. The details of this credit are set out in finding 19.

24. The certificate of overassessment representing an overpayment of $681,160.86 for 1918 allowed as a credit on the original schedule of overassessment dated October 29, 1932 was mailed by the Commissioner January 15, 1938. This certificate of overassessment showed the amount thereof computed as follows:

Income tax assessed: Original account #402298	$1, 594, 442. 63
Correct income tax liability	421, 910. 34
Overassessment	1, 172, 532. 29
Less: Amount withheld for adjustment in connection with proposed deficiencies against the Youngstown Sheet & Tube Company for the years 1924 to 1928, inclusive	491, 371. 43
Net overassessment	681, 160. 86

This overassessment is based on the recommendation of the Special Advisory Committee.

In addition, the schedule showed that the amount thereof had been credited against additional taxes for 1916, 1917, and 1920. Details of these credits are set out in finding 17.

25. The certificate of overassessment for $5,067.85, representing an overpayment for 1919 which likewise appeared on the original schedule signed by the Commissioner October 29, 1932, was mailed by the Commissioner January 15, 1938 and was computed as follows:

Income tax assessed: Original Account #450125	$88, 968. 84
Correct income tax liability	83, 900. 99
Overassessment	5, 067. 85

This overassessment is based on the recommendation of the Special Advisory Committee.

This certificate also showed that the entire amount had been credited against additional tax for 1920. The details of this credit are explained in finding 17.

26. The certificate of overassessment for $440,624.31, representing the final balance of the overpayment for 1918 which was allowed on the sixth supplemental schedule signed by the Commissioner dated December 28, 1937, was mailed by the Commissioner January 15, 1938, and showed the amount of the overassessment computed as follows:

Income tax assessed: Original account #402298	$1, 594, 442. 63
Correct income tax liability	421, 910. 34
Overassessment	1, 172, 532. 29
Less: Amount listed for adjustment on Schedule IT: 48225	681, 160. 86
Net overassessment	491, 371. 43
Less: Amount listed for adjustment on Fourth Supplemental Schedule IT: 48225	50, 747. 12
Net overassessment	440, 624. 31

This overassessment is based on the recommendation of the Special Advisory Committee.

This certificate also showed the manner in which both the principal and interest thereon were credited. The details of these credits are set out in finding 20.

27. Notices of interest allowances on the overpayment of $5,067.85 for 1919 and $681,160.86 for 1918, which were credited as heretofore shown, were mailed by the Commissioner January 15, 1938.

28. In January 1938 plaintiff through its representatives requested of the Commissioner a statement showing the application of the overpayments and interest thereon for the year 1918 and the Commissioner furnished information in reply thereto January 13, 1938. Plaintiff's representative made further inquiry by letter on February 4, 1938, and verbally on February 17, 1938, with respect to the portion of the overpayment not covered by the previous inquiry. In the letter of February 4, 1938 plaintiff indicated its dissatisfaction with the manner in which interest had been computed as well as asking that additional interest be paid to it. Those requests for information were answered by the Commissioner February 25, 1938 giving further explanation of the manner in which the computations had been made.

Plaintiff by letter dated June 20, 1938 made demand on the Commissioner for additional interest in the amounts of $39,996.27, $1,360, and $287,036.62, and attached to such request a detailed computation of the manner in which such interest was computed. The Commissioner replied to plaintiff's letter of June 20, 1938 by letter dated July 1, 1938, which, in addition to explaining the basis of the Commissioner's allowances, concluded with the following statement:

> The computations of interest due to and from the taxpayers concerned have been reviewed and found correct and your request for additional payments is denied.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit brought in the name of The Brier Hill Steel Company by John Tod, its surviving manager and trustee.

On March 1, 1923 plaintiff sold and transferred all of its assets, except the legal title to the claim here involved, to the Youngstown Sheet & Tube Company, and in 1926 the plaintiff was dissolved; but under the laws of the State of Ohio, John Tod, its surviving manager and trustee, is authorized to bring this suit in its name.

The suit is brought for the use and benefit of the Youngstown Sheet & Tube Company. While the bill of sale from plaintiff to that company excepted from the assets trans-

ferred "any claim or demand against the United States of America which under the laws thereof is nonassignable," which is the claim asserted in this suit, it was provided that plaintiff should "take all such action and do or cause to be done all such things as shall in the opinion of the Vendee be necessary or proper for, and to facilitate, the collection of the moneys due and payable, and to grow due and payable to the Vendor," and to promptly pay over to the vendee all moneys so collected. The vendee agreed to pay all costs and expenses of actions taken in order to collect said claim. This suit, therefore, is a suit brought for the sole use and benefit of the Youngstown Sheet & Tube Company. While the Brier Hill Steel Company is the nominal plaintiff, the real plaintiff is the Youngstown Sheet & Tube Company.

Plaintiff's brief raises three issues, the first of which involves interest on an amount of $686,228.71, which is a portion of an overpayment of taxes by the plaintiff for the years 1918 and 1919. This amount was applied by the Commissioner of Internal Revenue to a deficiency in taxes due by the plaintiff for the years 1916, 1917, and 1920, and assumed by the Youngstown Sheet & Tube Company under the bill of sale.

It was not determined that plaintiff owed additional taxes for 1916, 1917 and 1920 until after plaintiff had sold all of its assets to the Youngstown Sheet & Tube Company. This determination was made on February 23, 1927. On that date the Commissioner of Internal Revenue addressed a so-called sixty-day letter to the Youngstown Sheet & Tube Company proposing to assess against it, as plaintiff's transferee, a deficiency for the years 1916 to 1920, both inclusive. The Youngstown Sheet & Tube Company took an appeal to the Board of Tax Appeals. Later, on September 3, 1932, the parties entered into a stipulation filed in the Board proceedings, under which it was agreed that the Youngstown Sheet & Tube Company, as plaintiff's transferee, owed additional taxes for 1916, 1917, and 1920 in the aggregate amount of $686,228.71, and that the plaintiff had overpaid its taxes for 1918 and 1919 in the aggregate amount of $1,177,600.14.

On September 7, 1932 the Board entered its order deciding that the Youngstown Sheet & Tube Company was liable for these deficiencies.

The Commissioner used $686,228.71 of the overpayment due plaintiff to discharge the liability of the Youngstown Sheet & Tube Company for the deficiencies in taxes due by the plaintiff for the years 1916, 1917, and 1920. The plaintiff does not complain of this—in fact, it requested it—but it does complain of the amount of interest allowed on this part of the overpayment. It says that since it is entitled to the overpayments and since the Youngstown Sheet & Tube Company owed the deficiencies, that it was entitled to interest on the overpayment until it was paid; but, since after February 26, 1926 both the overpayment and the deficiencies drew interest at the same rate, it only claims interest on the overpayment up to February 26, 1926. Prior to this time overpayments drew interest, but deficiencies did not.

The defendant allowed interest on this part of the overpayment from the date of the overpayment to the due date of the taxes against which this part of the overpayment was credited.

The plaintiff says that its claim against the United States for overpayment of taxes for 1918 and 1919 was not assignable, and was not assigned, and, therefore, that it and it only was entitled to collect this overpayment and interest thereon, and that since the deficiencies for 1916, 1917, and 1920 were not assessed against it, but against the Youngstown Sheet & Tube Company, as its transferee, the Commissioner could not apply money due it to an assessment against another corporation, and allow interest only to the due date of the deficiency.

This position is clearly untenable. Had plaintiff not sold its assets to the Youngstown Sheet & Tube Company at the time the deficiencies were asserted for the years 1916, 1917, and 1920, it is clear that under section 614 of the Revenue Act of 1928 it would have been entitled to interest on the overpayments only from the date of the overpayments to the due date of the taxes for the years 1916, 1917, and 1920, against which the overpayments were ap-

plied. Section 614 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 876) provides for 6 percent interest on overpayments as follows:

> (1) In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken * * *.

Had the Brier Hill Steel Company not transferred its assets to the Youngstown Sheet & Tube Company, there could be no question about the correctness of the Commissioner's computation of interest on that part of the overpayments which were applied to discharge the deficiencies for 1916, 1917, and 1920. Plaintiff would have been entitled to interest only until the due date of the taxes against which the overpayment was applied. The Youngstown Sheet & Tube Company acquired legal or equitable title to all of plaintiff's assets. One of its assets was this interest. The sale by plaintiff to the Youngstown Sheet & Tube Company could not create in that company a right to more interest than plaintiff was entitled to. It was entitled to interest only to the due date of the taxes against which the overpayment was applied. This has been paid.

The deficiencies for 1916, 1917, and 1920 were assessed against the Youngstown Sheet & Tube Company under section 280 of the Revenue Act of 1926, as plaintiff's transferee, but they might have been assessed against plaintiff and collected by suit against the Youngstown Sheet & Tube Company. Had this been done, it is clear that section 284 of the Revenue Act of 1926 required the overpayment for 1918 and 1919 to be credited against the deficiency for 1916, 1917, and 1920, and in this case it is clear interest on the overpayment would have been computed, under section 614 of the 1928 Act, only until the due date of the 1916, 1917, and 1920 taxes. The proposition that the assessment of the deficiencies against the Youngstown Sheet & Tube Company, instead of against plaintiff, created a right to greater interest is not supported either by logic or by law.

Section 284 (a) of the Revenue Act of 1926 (44 Stat. 9, 66) provides in part:

> Where there has been an overpayment of any income, war-profits, or excess-profits tax * * * the amount

> of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

The overpayment of taxes with which we are here concerned was an overpayment by the plaintiff, but the Youngstown Sheet & Tube Company became exclusively entitled thereto under the terms of the bill of sale. As a matter of form it was required that the overpayment should be refunded to the plaintiff, but this was for immediate transmission to the Youngstown Sheet & Tube Company, and the Youngstown Sheet & Tube Company had the right to enforce payment of this amount by suit instituted in the name of the Brier Hill Steel Company. There was, then, an overpayment due the Youngstown Sheet & Tube Company for 1917 and 1918, and there was a deficiency due by it for the years 1916, 1917, and 1920. The statute just quoted provides for the crediting of the overpayment against the deficiency and for the refund of the balance.

It is evident the plaintiff would have included its claim for refund of the overpayment among the assets transferred except for R. S. 3477 prohibiting assignment of claims against the United States. What it did was to transfer its claim so far as this statute permitted. Had it been possible to have made a legal assignment of it and had this been done, there would seem to be but little doubt that the sections above referred to would require the overpayment to be credited against the deficiency, and for the payment of interest on the overpayment only until the due date of the deficiency. There was no legal assignment of the claim for the overpayment, but there was an equitable assignment, and the overpayment, in fact, was due the Youngstown Sheet & Tube Company.

It seems to us the most the Youngstown Sheet & Tube Company, or the plaintiff for it, can demand of the United States is that which the United States has already granted, to wit, interest on the overpayment from the date of the overpayment only until the due date of the taxes against which they were applied.

The second issue concerns interest on another part of the overpayment for the years 1918 and 1919. After the $686,288.71 had been used to offset plaintiff's deficiency for 1916, 1917, and 1920, there remained a balance of $491,371.43. Of this amount $50,747.12, plus interest thereon, was applied to settle the liability of the Youngstown Sheet & Tube Company, as transferee of the Steel & Tube Company of America, for an assessment of taxes due by the latter for 1920. The controversy is over the computation of interest on this amount. The plaintiff claims interest in the amount of $47,194.82; the defendant allowed interest of $20,697.07. The plaintiff computes interest from the date of the overpayment until the date it was applied as a credit to the taxes due. The defendant computed the interest as follows: (1) on the amount of the overpayment used to discharge the deficiency in tax, $34,386.86, from the date of the overpayment to the due date of the tax, December 15, 1921; (2) on the amount of the overpayment used to discharge interest on a late payment of the original tax of the Steel & Tube Company of America, $411.36, from the date of the overpayment to the date the liability for interest was satisfied, which was on December 16, 1927; and (3) on the amount of the overpayment used to discharge interest on deficiencies in tax of the Steel & Tube Company of America, $15,948.90, from the date of the overpayment until the date it was used to pay this interest, which was on October 19, 1934. The interest allowed on item (1) of the overpayment was $5,648.86, item (2), $215.73, and item (3), $14,832.48, a total of $20,697.07.

The only possible complaint the plaintiff can have about this computation of interest is that computed on that part of the overpayment which was applied in satisfaction of the tax liability, as distinguished from that part of it used to satisfy the interest. Interest on the part of the overpayment used to discharge the liability for interest was allowed to the date it was used to satisfy this liability. The plaintiff could not ask that it be computed for a longer time.

Interest on the part of the overpayment used to discharge the liability for taxes was allowed only to the due date of the taxes. We think this was correct.

The overpayment was in fact due the Youngstown Sheet & Tube Company through the medium of the plaintiff. Section

284 (a) *supra*, provides for crediting an overpayment due a taxpayer against other taxes due by it. Under section 280, *supra*, it owed the taxes due by the Steel & Tube Company of America, as its transferee. Section 614, *supra*, provides for computing interest on an overpayment from the date of overpayment until the due date of the taxes against which they were credited. The interest was so computed.

The Youngstown Sheet & Tube Company recognized the propriety of offsetting the Brier Hill Steel Company's overpayment against its liability as transferee of the Steel & Tube Company of America. When it received notice of the assessments on account of the deficiency due by the latter company, it wrote the Commissioner requesting "that the deficiency of $61,194.95 which is now being demanded from the Youngstown Sheet & Tube Company [as the transferee of Steel & Tube Company of America] be paid and absorbed by a credit of that sum against the overpayment resulting from the settlement made in regard to the Brier Hill interests of the Youngstown Sheet & Tube Company * * *."

The reason Congress agreed to pay interest only until the due date of the deficiency against which it was credited was that prior to 1926 deficiencies did not bear interest and, therefore, the defendant, quite reasonably, was unwilling to pay interest on what it owed a taxpayer if the taxpayer at the same time owed it an equal amount which did not draw interest. Hence, it agreed to pay interest only during the time the taxpayer was not indebted to it.

In the case at bar the defendant was indebted to the Youngstown Sheet & Tube Company in fact, if not in name, for an overpayment of taxes for 1918 and 1919. The Youngstown Sheet & Tube Company became indebted to the defendant for taxes due for 1920. For what reason should the defendant pay interest on what it owed the Youngstown Sheet & Tube Company after the date the Youngstown Sheet & Tube Company became indebted to it in an equal amount? And what difference does it make in what way the Youngstown Sheet & Tube Company became indebted to the defendant, whether on its own account or by reason of an assumption of a liability of another? The material fact is that there were cross accounts, an

indebtedness from the Youngstown Sheet & Tube Company to the defendant, and an indebtedness from the defendant to the Youngstown Sheet & Tube Company. Certainly interest should be paid only to the date the defendant's indebtedness was offset by the Youngstown Sheet & Tube Company's indebtedness to it. Interest was computed by the defendant to this date. This is all the Youngstown Sheet & Tube Company was entitled to. Neither it nor the plaintiff for it can demand more.

Moreover, it appears that plaintiff has not been denied the interest it says is due on the basis of a computation treating the corporations as separate and unrelated entities. In its brief it sets out its computation of interest on the overpayment. It computes this interest from the date of the overpayment, March 19, 1919, to the date it was applied to discharge the deficiency, which was on September 19, 1934, a total amount of $47,194.82, which added to the principal amount of the overpayment equals $97,941.94. Plaintiff says that the deficiency of the Steel & Tube Company of America, with interest from its due date to the date the overpayment was applied against it, only amounted to $61,194.95, and, therefore, that it has not been paid interest in the amount of $36,746.99, the difference between the total of the overpayment and interest and the amount of the deficiency and interest. But plaintiff overlooks an amount of interest due by the Youngstown Sheet & Tube Company, as the transferee of the Steel & Tube Company of America, on other delinquent payments, as set out in finding 19. This finding shows that there was due interest from the Youngstown Sheet & Tube Company, as the transferee of the Steel & Tube Company of America, in the amount of $37,057.33 on three delinquent payments. Plaintiff's computation leaves this interest unsatisfied, and it exceeds the balance which plaintiff claims is due. Even though plaintiff's position be correct, and the defendant were required to pay plaintiff this balance of interest claimed to be due, the defendant could immediately assert a claim for the deficiency in interest due by the Youngstown Sheet & Tube Company, and one would offset the other; in fact, according to plaintiff's calculation, the Youngstown Sheet & Tube

Company owes the defendant $310.34 more interest than the defendant owes the plaintiff.

Plaintiff has received credit for all to which it is entitled according to its own calculation of the amount due.

The third and last issue discussed in plaintiff's brief for additional interest in the sum of $9,309.75 was not raised in plaintiff's pleadings and, therefore, is not before us for consideration.

It may be said that no issue is made as to the computation of interest on the balance of the overpayment of $440,624.31. On this the Commissioner allowed interest in the amount of $495,527.30, computed for a period evidently satisfactory to plaintiff.

Defendant also raises the defense of the statute of limitations, but in view of our opinion on the merits it is not necessary to discuss this issue.

The plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

FIFTH AVENUE-14TH STREET CORPORATION v. THE UNITED STATES

[No. 45444. Decided June 1, 1942]

On the Proofs

Capital stock tax; corporation "engaged in business".—Where the plaintiff, a corporation, during the tax period involved, owned and operated a 16-story loft building usually leased to a number of tenants; and where said building was managed by an agent who collected the rents from said tenants and attended to the operation of the building, paying the operating expenses and remitting to plaintiff the net proceeds once a month; and where the leases were made by the agent subject to the approval of the plaintiff; and where from the net rental proceeds so received, plaintiff paid the mortgage interest, taxes, insurance, and other expenses not directly connected with the operation of the building; it is *held* that plaintiff was engaged in "carrying on or doing business" within the meaning of the tax statute and is accordingly not entitled to recover. *McCoach v. Minehill Railway*, 228 U. S. 295 and other cases distinguished.

The Reporter's statement of the case:

Mr. Harry Friedman for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff, Fifth Avenue-14th Street Corporation, at all times material hereto was a corporation organized and existing under the laws of the State of New York.

The certificate of incorporation conferred broad powers upon the plaintiff but the only charter power that plaintiff ever exercised was the purchase, holding and rental of a building at 80 Fifth Avenue, and its sole activity during the fiscal years ending June 30, 1936, 1937, 1938, and 1939, has been confined entirely to the ownership of this building. It has never owned any other building or any other real estate.

2. The building at 80 Fifth Avenue was a sixteen story loft building 73′ x 107′. It was usually leased to approximately twenty-eight (28) tenants. The usual term of lease for the lofts was one year and for the stores, five years.

During the taxable years 1935 to 1939 the building was managed by Adams & Co., as managing agents. The contract with Adams & Co., which is on a printed form usually employed for such a management and agency agreement, provided that the agent agreed with the owner—

(a) To furnish the services of its organization for the renting, operating, and managing of said property; to diligently follow up all inquiries on Owner's behalf; and to show and exhibit vacant space to prospective tenants.

(b) To supervise and on behalf of Owner to employ all labor required for the operation and maintenance of said property.

(c) To collect rents and other charges from said property and to render monthly statements of all rents and other sums collected and disbursements made with vouchers therefor, and remit receipts less disbursements and Agent's commissions.

In case the disbursements shall be in excess of the rents collected by Agent, Owner agrees to pay such excess promptly upon demand.

(d) To supervise any repairs and/or alterations that may be necessary, and to make minor and/or emergency repairs necessary to operate the appurtenances of the building and/or for the protection thereof.

It also provided that the owner would refer to the agent all inquiries for leasing and also would furnish policies of insurance covering the property.

3. The managing agent negotiated and prepared the leases and then submitted them to plaintiff for its approval. The usual form of lease entered into with the tenant contained the following provision:

> 33. It is specifically understood and agreed that this lease is offered to the Tenant for signature by the managing agent of the building solely in its capacity as such agent and subject to the Landlord's acceptance and approval, and that the Tenant has hereunto affixed its signature with the understanding that the said lease shall not in any way bind the Landlord or its agent, until such time as the same has been approved and executed by the Landlord and delivered to the Tenant.

4. The managing agent collected the rents from the tenants and paid everything in connection with the operation of the building, remitting to the plaintiff once a month the net proceeds from the building. The checks received from the agent were deposited and out of this fund plaintiff paid the mortgage interest, taxes, insurance, and general or miscellaneous expenses not directly connected with the operation of the building. Dividends were declared out of any profits and were paid to the stockholders.

5. The source of plaintiff's income and how its expenses are paid are shown by the following statement of its income and expenses for the year 1939, which is typical of other years involved:

Items of income collected by real-estate agents:		
Rents	$154, 164. 57	
Electric current collections	6, 168. 46	
Sprinkler collections	243. 46	
Water collections	835. 30	
Total income from building		$161, 411. 79

Item	Amount	Total
Items of expense paid by real-estate agents:		
Water taxes	$980.19	
Wages	16,206.92	
Repairs	8,147.74	
Electric current	3,087.07	
Fuel	3,204.08	
Collection fees	3,487.08	
Annual charges	668.64	
Supplies	1,027.13	
Miscellaneous expenses	858.09	
Interest paid	601.25	
Commissions	1,655.92	
Utility tax	647.70	
Total expenses paid by real-estate agents		$40,580.81
Items of expense paid by treasurer of company:		
Interest on mortgages	$26,716.71	
Real-estate taxes	27,255.25	
Insurance	1,753.94	
Miscellaneous expenses	2,547.06	
Officers' salaries	3,600.00	
Interest paid	253.96	
Proration of mortgage expense	885.78	
Legal and accounting	2,065.20	
State franchise tax	917.58	
Capital stock tax	498.00	
Unemployment insurance tax	685.06	
Social Security tax	176.46	
Total expenses paid by treasurer of company		67,355.00
Depreciation		26,785.72
Total expenses		134,721.53

6. The plaintiff filed capital stock tax returns for the fiscal years ended June 30, 1936, June 30, 1937, June 30, 1938, and June 30, 1939. The tax liability shown on these returns was assessed by the Commissioner of Internal Revenue and paid to the Collector of Internal Revenue for the Third District of New York on the dates and in the amounts following:

Date	Amount
July 31, 1936, for the fiscal year 1936	$500.00
August 13, 1937, for the fiscal year 1937	502.00
August 2, 1938, for the fiscal year 1938	500.00
June 22, 1940, for the fiscal year 1939	500.00

a total of $2,002. Interest of $23.71 was paid for the fiscal year ended June 30, 1939, on June 22, 1940.

7. The plaintiff filed claims for refund for the years ended June 30, 1936, June 30, 1937, and June 30, 1938, on June 29, 1940; and a claim for refund for the year ended June 30, 1939, on September 11, 1940. These claims were all based upon the ground that the plaintiff was not carrying on or doing business within the fiscal years ended June 30, 1936, to June 30, 1939, both inclusive. These claims were rejected by the Commissioner of Internal Revenue on December 4, 1940.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is an action to recover capital stock taxes paid and alleged to have been wrongfully assessed against the plaintiff.

Plaintiff is a corporation with broad charter powers, but its only activities were as stated below:

During the period involved, it owned and operated a sixteen-story loft building usually leased to about twenty-eight tenants for a term of one year for lofts and five years for stores. The building was managed by an agent who collected the rents from the tenants and paid and attended to everything in connection with the operation of the building, remitting to plaintiff the net proceeds once a month. The leases were made by the agent subject to the approval of the plaintiff. The checks received from the agent were deposited and out of this fund the plaintiff paid the mortgage interest, taxes, insurance, and general or miscellaneous expense not directly connected with the operation of the building. Dividends were declared out of any profits and paid to the stockholders.

The only question presented by the case is whether plaintiff was, during the taxable years involved, "carrying on or doing business" within the meaning of the tax statute applicable, and the decision of this question must depend on the facts appearing in evidence.

The plaintiff relies on *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, but a careful reading of the opinion in that

case shows that instead of sustaining the plaintiff's contention that it was not doing business, it holds to the contrary. On page 302 of the opinion (quoting from another case), the court said:

> We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, * * * are engaged in business within the meaning of this statute, * * *.

The opinion also refers to the case of *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, in which it appeared that a corporation originally "organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor, * * * had afterwards made a lease of all lands belonging to it to certain trustees for a term of 130 years" and amended its articles of incorporation so as to confine the purpose thereof to the ownership of the lands, subject to the lease. With reference to these operations, the court quoted with apparent approval from the decision in the case last cited as follows [page 303 of the opinion]:

> The corporation involved in the present case, as *originally* organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. * * * [Italics supplied.]

In the *McCoach case, supra*, the question was whether a corporation which had been operating a railway but which leased its railroad for nine hundred ninety-nine years and ceased to carry on any business in connection with it was subject to the excess profits tax on its income and the Supreme Court held in effect that it was not doing business within the meaning of the statute and not subject to the tax. It is plain that this case does not sustain the plaintiff's contention.

No precise and definite rule can be laid down in the determination of cases of the nature of the one before us.

As was said in *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 516, "* * * the decision in each instance must

depend upon the particular facts before the court." We are not here considering the rental of a single tract of land, a single house or a single room. The case involves a very large sixteen story building usually having about twenty-eight tenants for lofts and stores. Presumably it had corridors, stairways, elevators, a heating apparatus and the usual features of such a building. Employees were necessary, and the management of the building required a large amount of care and attention. All leases were made subject to the approval of the plaintiff and in every way the building was under its control. All these operations were conducted for a profit and the fact that they were carried on largely through an agent does not lessen plaintiff's responsibility. We are clear that the plaintiff was "doing business" within the meaning of the applicable statute. The plaintiff cites the case of the *Estate of Isaac G. Johnson* v. *United States*, 92 C. Cls. 483, but in this case it appeared that the operations of the corporation were solely for the purpose of liquidating its property and distributing the proceeds among its stockholders. While profit sometimes resulted, this was not the purpose of its activities.

The case last cited followed the rule laid down in the case of *Union Land & Timber Co.* v. *United States*, 65 C. Cls. 129, which cited *Von Baumbach* v. *Sargent Land Co.*, *supra*, and others, and held in effect that a corporation which is solely engaged in liquidating its property and distributing its proceeds among the stockholders is not subject to the capital stock tax. These cases consequently give no support to plaintiff's contention that its numerous activities all conducted for the purpose of profit did not constitute doing business.

The petition of plaintiff must be dismissed, and it is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

ELIZABETH SMITH v. THE UNITED STATES

[No. 45043. Decided June 1, 1942]

On the Proofs

Rental of property by Government; damage during occupancy and removal.—Where plaintiff in March 1936 purchased a six-story office building in Oklahoma City, Oklahoma, which was then being used by the Federal Works Progress Administration and its affiliated State and local agencies, under an arrangement by which the City of Oklahoma City paid the rental, as permitted by law; and where in December 1936 a written lease was entered into by the plaintiff and the United States which provided that the defendant should pay an additional sum as rental, estimated to be sufficient to cover liability insurance; and where said lease contained the usual provision for restoring the premises to the same condition as existed at the time of the making of the lease, reasonable and ordinary wear and tear excepted; and where said building was, after notice, vacated by the defendant's agencies on September 30, 1938; and where it is established by the evidence that during the period of occupancy the building and equipment were damaged in many ways, and in removal of the agency and its equipment further and unnecessary damage was done to the building; it is *held* that plaintiff is entitled to recover compensation for the restoration cost on account of the damages in excess of ordinary wear and tear that were caused during the period of plaintiff's ownership and defendant's occupancy and to recover for the rental on the building for the period during which it was actually occupied by defendant after rental payments had ended.

Same; waiver of notice.—Where the rental contract called for written notice more than 30 days prior to the termination of the lease contract that the owner would require restoration; it is *held* that such provision for notice can be waived, and was in fact waived in the instant case by conversations between defendant's representatives and plaintiff respecting repairs to be made.

Same; damages before purchase by plaintiff.—For the period of occupancy prior to plaintiff's purchase of the property it is *held* that plaintiff is not entitled to recover for damages to the building since plaintiff's claim for such period would be under assignment. (31 U. S. C. A. 203).

The Reporter's statement of the case:

Mr. Frederic N. Towers for the plaintiff. *Mr. Norman B. Frost* and *Messrs. Everest* and *Halley* were on the brief.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, an individual, is the owner of a building located at 431–433 West Main Street, Oklahoma City, Oklahoma, known as the Bass Building. The building was acquired by plaintiff March 9, 1936. It was constructed in 1930 for occupancy by a furniture company and consisted of six stories and basement with approximately 40,000 square feet of floor space. It was of reinforced concrete and brick construction. With the exception of the first floor which had a store front and included a mezzanine floor, the other five floors were of the open loft type with windows in the front and back but without any windows for light and air on either side. All the floors (with the exception of the first which was of maple and the mezzanine of pine) were of cement. With the exception of the basement, first floor, and mezzanine, the greater part of the other floors was covered with carpet. The building was equipped with passenger and freight elevators.

The building was occupied by the Bass Furniture Company from about the date of its completion on June 15, 1930, until September 15, 1931, having been constructed in accordance with the specifications of the furniture company.

2. The Bass Building was unoccupied from the time it was vacated by the Bass Furniture Company on September 15, 1931, until February 1934. February 14, 1934, a verbal agreement was entered into between the city of Oklahoma City and the owner for the use of the building in connection with activities pertaining to the relief program as State Headquarters of the Civil Works Administration, which had been organized under the supervision and guidance of agencies and representatives of the Government

under emergency relief acts and executive orders issued pursuant thereto. A representative of the Federal Government was present at the negotiations for the verbal agreement. A memorandum was made of the verbal agreement which was signed by a representative of the owner and the City Manager of Oklahoma City, but it was not signed by any representative of the United States. Under the agreement it was provided that the building was to be occupied on a month to month basis at a rental of $600 a month, that the purposes of occupancy were for activities pertaining to the relief program, that in the event of a sale the tenant was to vacate on sixty days' notice, and that in the event the tenant ceased relief activities it might vacate on thirty days' notice. The agreement also contained the following provisions:

> ALTERATIONS—Tenant is to accept the building in its present condition, and to make any and all alterations at the sole expense of Tenant, subject to the acceptance of the owner, and has the right to remove any and all installations at termination.
>
> INVENTORY—The attached Inventory, dated January 10th, 1934, is accepted by the Tenant, with full responsibility to deliver the property enumerated in the Inventory in as good condition as they now are.
>
> PERSONAL INJURY—The Tenant is to assume all responsibility and liability for personal injury of occupants or employees of the Tenant, and to hold the owner harmless for such. Tenant is likewise to be responsible for any broken glass, either plate or window.

3. From February 14, 1934, the building was occupied under that agreement by the Civil Works Administration, the Federal Emergency Relief Administration, and from July 1, 1935, to December 1936, by the Works Progress Administration. As heretofore shown, plaintiff had acquired the premises in March 1936, which was during the period of occupancy by the Works Progress Administration. Throughout the period from February 1934 to December 1936, the city of Oklahoma City paid the rental of $600 a month. While during the period of occupancy the titles of the various agencies changed from time to time, the personnel of the organizations (except for changes in the officials) remained

substantially the same from February 1934 to October 1938, and substantially the same type of activities was being carried on. From 500 to 600 people were employed in the building over the greater part of the period of occupancy from 1934 to 1938, inclusive.

4. In December 1936 plaintiff became disturbed because of a lack of public liability insurance on the premises and asked that the Works Progress Administration take steps which would provide protection for her. As a result of plaintiff's request, on December 21, 1936, a lease agreement was entered into between plaintiff and the United States which so far as here material read as follows:

* * * * *

2. The Lessor hereby leases to the Government the following described premises, viz:

Building located at 431–3 West Main, Oklahoma City, Oklahoma, containing approximately 40,000 square feet of floor space.

Space to have sanitary equipment including toilet facilities for both men and women.

Building must have both passenger and freight elevators and be equipped with sprinkler system.

to be used exclusively for the following purposes (see instruction No. 3): Works Progress Administration headquarters.

3. To HAVE AND TO HOLD the said premises with their appurtenances for the term beginning December 21, 1936 and ending with June 30, 1937. This lease may be terminated upon thirty days written notice by either party.

4. The Government shall not assign this lease in any event, and shall not sublet the demised premises except to a desirable tenant, and for a similar purpose, and will not permit the use of said premises by anyone other than the Government, such sublessee, and the agents and servants of the Government, or of such sublessee.

5. This lease may, at the option of the Government, be renewed from year to year at a rental of $100.00 per month and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least thirty days before this lease or any renewal thereof would otherwise expire: Provided, that no renewal thereof shall extend the period of occupancy of the premises beyond the thirtieth day of June, 1938.

8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the premises hereby leased (provided such alterations, additions, structures, or signs shall not be detrimental to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions, or structures so placed in or upon or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by the Lessor, shall, before the expiration of this lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted: Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Government thirty days before the termination of the lease.

9. The Government shall pay the Lessor for the premises rent at the following rate: One Hundred ($100.00) dollars per month. Payment shall be made at the end of each month.

* * * * *

The amount of $100 paid by the defendant under that lease covered substantially the liability insurance premiums of plaintiff. During the period covered by that lease the city of Oklahoma City continued to pay a rental of $600 a month.

5. May 30, 1937, defendant renewed the lease of December 21, 1936, for the period from July 1, 1937, to June 30, 1938, under the same terms and conditions. July 1, 1938, pursuant to an invitation for bids and the submission of a bid, plaintiff and defendant entered into a lease of the premises for one year from July 1, 1938, at $100 a month. That lease, except for the period involved, contained substantially the same provisions quoted in finding 4. During all the period from February 1934, to September 30, 1938, the city of Oklahoma City paid a monthly rental on the premises of $600 a month, and from December 21, 1936, until September 30, 1938, the defendant paid a rental of $100 a month. The

total rent of $700 paid by Oklahoma City and the defendant represented the reasonable rental value of the property.

6. August 22, 1938, the city of Oklahoma City advised plaintiff that it would cease paying the rent on the Bass Building with the September payment for the reason that the Works Progress Administration would vacate that building by October 1, 1938.

By letter dated August 23, 1938, the Oklahoma State Procurement Officer of the Treasury Department formally notified plaintiff of the cancellation of the lease as follows:

> This office has today been requested by the Works Progress Administration to effect cancellation of the above numbered lease contract, covering premises occupied at 431 West Main Street, Oklahoma City, Oklahoma, being more completely described as the Bass Building.
>
> You are, therefore, notified that the above numbered lease will be cancelled in accordance with paragraph #3 of lease form #2, as of September 30, 1938.
>
> You are further notified that the State Procurement Officer of the U. S. Treasury Department accepts no responsibility for any rentals after September 30, 1938.

August 30, 1938, plaintiff replied to the notice as follows:

> This will acknowledge receipt of and acceptance of your notice of August 23rd of cancellation of the above lease, covering premises occupied by the Works Progress Administration, at 431 and 433 West Main Street, Oklahoma City, Oklahoma, in accordance with paragraph 3 of lease form 2, as of September 30th, 1938.

No rental was paid either by Oklahoma City or the defendant for any period after October 1, 1938.

7. At the time the letter of August 23, 1938, was written, arrangements were being made to remove the Works Progress Administration from the Bass Building to certain municipal buildings, and the major portion of that organization was moved out by September 30, 1938. However, since a part of the premises to which it was being moved was not ready for occupancy at that time, one unit of the organization remained in the building, and certain supplies were kept in the basement until some time later.

8. A representative of the plaintiff went to the building on August 23, 1938, the day notice of cancellation was re-

ceived. He talked with the man who was apparently in charge of the building and who stated that he had taken the place of the building superintendent and engineer, and who advised that he was going to have the building repaired and put in good shape for the plaintiff.

On or about September 30, 1938, plaintiff's representative again went to the Bass Building for the purpose of taking possession of the building and getting the key, but was advised by someone, who was pointed out to him as in charge of the building, that the Government was not yet through with the building. He accordingly did not get the key and left without making any further demand.

October 17, 1938, representatives of both plaintiff and defendant met at the Bass Building for the purpose of determining what repairs would be required by plaintiff from the defendant because of damage done to the building during the period of occupancy. After some discussion during which no agreement was reached as to repairs, it was suggested by defendant's representatives that plaintiff have a list made of the desired repairs. For the purpose of gaining access to the building, defendant's representatives made available to plaintiff's representative a key to the building which was returned to defendant's representatives on or shortly after October 21, 1938, when plaintiff submitted a list of the desired repairs. Defendant used the key during October and November, 1938, to gain access to the building, in which it was doing certain work at that time, such as replacing electrical fixtures and other things of a similar nature. November 30, 1938, defendant's representative notified the local utility company to discontinue light and power service for the building after that date, and such service was discontinued December 1, 1938. The utility company obtained the key from a representative of defendant in order to gain access to the building to make the disconnection and thereafter returned it to the same party. The key remained in the possession of the defendant until it was delivered to plaintiff July 7, 1939, during which period no demand was made by plaintiff or her representative for the key or possession of the building.

9. Shortly after the meeting of October 17, 1938, referred to in the preceding finding, namely on October 21, 1938, plaintiff wrote defendant as follows:

> As requested by Mr. C. D. Barricklow, Administrative Assistant, that I give you a statement of what is required to put the building at 431 and 433 West Main Street, Oklahoma City, Oklahoma in as good condition as when leased for occupancy by the U. S. Government offices on January 10th 1934, the usual wear and tear excepted, I have attached hereto a detailed statement, which is made a part of this letter.
>
> I have also attached a copy of the inventory made of contents of the building on January 10th 1934.

The above letter was the first written notice given by plaintiff to defendant concerning repairs to the building. The list attached set out in detail the repairs desired and the inventory of January 10, 1934, gave in detail the condition of the building, fixtures, and equipment on that date when it was proposed to be occupied by the Federal Transient Bureau of the United States Government. However, the latter agency did not occupy the premises and they remained vacant until occupied by the Civil Works Administration on February 14, 1934.

10. As heretofore shown, the Bass Building was constructed in 1930 and had been occupied by a furniture company from June 15, 1930, to September 15, 1931. It was vacant from the latter date until its occupancy on February 14, 1934. At the time the Civil Works Administration took possession of the building in February 1934 the wooden flooring of the first and mezzanine floors needed cleaning; otherwise the building and its equipment were in good condition generally. During the period of occupancy from February 1934 until vacated by the defendant's agencies, the building and the equipment were damaged in various ways including the following:

The walls were badly marred and defaced where holes had been cut for purposes of plumbing and ventilation and where conduits had been installed for electrical purposes. Holes had likewise been cut in many of the columns in the building. Some tile partitions had been removed and some

radiators were disconnected. Some of the toilet fixtures had been removed, while others were dirty or in need of repairing. Window shades had been torn and damaged. Many parts of the building had been subdivided with partitions and altered on various occasions during the period of occupancy, and the partitions were removed when the Works Progress Administration vacated the premises. These partitions had been hurriedly installed and when removed they were knocked out with sledge hammers and crowbars, causing much damage to floors and walls. Water from the water coolers had been permitted to stand on the maple flooring and it was badly rotted in places. Part of the penthouse floor had been taken up to permit the removal of a generator installed by the defendant, and one wall of the penthouse had been removed.

A number of doors and some of the door frames had been removed, and the steel balustrade of the stairway from the sixth floor to the roof had been hammered loose to allow the easy removal of a large air conditioning fan and other equipment from the penthouse. Electrical fixtures were broken or, in some instances, missing.

11. In February 1939 plaintiff caused an examination of the building to be made by the building firm which had constructed it, for the purpose of making an estimate of the cost of repairs necessary to place the building in the condition in which a tenant with ordinary usage would have left it when the premises were vacated. February 14, 1939, the construction firm submitted an estimate of $7,025 which included a fee of 10 percent for the contractor and liability and payroll tax. The first paragraph of the letter from the building firm transmitting the estimate read as follows:

> We hand you herewith itemized estimate of repairs which we consider necessary to completely recondition the above building and to restore same to approximately the same condition that it was in prior to January 10, 1934.

The above estimate represented the reasonable cost of restoring the building to approximately the same condition it was in when occupied by the Civil Works Administra-

tion on February 14, 1934, but it did not take into proper account the wear and tear which would be occasioned by the type of occupancy involved and the obligation which would rest upon the landlord under the lease to do certain work on account of the ordinary wear and tear occasioned by the occupancy by the tenant. For example, the estimate included approximately $2,200 for repainting the building throughout and pointing up the holes in the walls, whereas at least a very substantial part of this work would devolve upon the owner.

12. After the submission of the estimate referred to in the preceding finding, defendant caused an examination of the building to be made by its representatives who submitted a report dated Ferubary 27, 1939, showing an estimated cost on the repair work of $773.05. The report stated that it constituted a determination of the cost of "the work and materials necessary to replace the building in the same condition as of February 1934, exclusive of ordinary wear and tear." In making that estimate, defendant's representatives allowed only for what it regarded as damage in excess of ordinary wear and tear and took into consideration the type of occupancy of the building; that is, that the ordinary wear and tear when rented to the Works Progress Administration would be greater than if rented to a concern of the type for which the building was constructed. Several items were omitted and in other instances the amount allowed was insufficient to pay even the cost of essential materials. While allowance was made in the estimate for patching and pointing up the walls, no allowance was made for repainting the interior of the building on the basis that in the event the building was occupied by a new tenant it would be the duty of the owner to paint the premises. The defendant's report states that $362.40 of the above amount represented items on account of damage done prior to July 1, 1935. The estimate was made on the basis that the work would be done on a force account with W. P. A. labor.

13. Subsequent to the submission of the report of February 27, 1939, plaintiff's representative had further conferences with defendant's representative. As a result thereof

on May 11, 1939, defendant's representative advised plaintiff's representative in part as follows:

> Mr. Thornton's report indicates that while the contractor's estimate of $6,260 covering the rehabilitation of the building to its original state appears to be in order, it is his considered opinion that the damage occasioned by other than normal wear and tear of the premises does not exceed $1,331. It is the opinion of our Regional Engineer that the difference between the damages estimated as being due to other than wear and tear, and the estimate quoted by the contractor, represents items of maintenance and repair which normally would be accepted by the lessor of a building of this type.
>
> In view of the recommendations of our Regional Engineer, the State Administrator for the Works Progress Administration is being advised that he may proceed with making repairs to your client's building to the extent outlined in our Regional Engineer's report, after consultation with you, and after receiving from you or your client a release for any other claims against the Government resulting from the occupancy of this building by the various Federal relief agencies.

14. May 23, 1939, plaintiff rejected the offer of $1,331 set out above and submitted claim for $13,325 made up as follows:

Rent for 9 months @ $100.00 per mo	$900.00
Rent for 9 months @ $600.00 per mo	5,400.00
Repairs to Building	7,025.00
	13,325.00

May 26, 1939, plaintiff gave formal notice of the termination of the lease effective June 30, 1939, and made formal demand that the repairs in the amount of $7,025 referred to in finding 11 be made by defendant. In addition plaintiff made demand for the payment of the two rental items referred to in her letter of May 23, 1939.

No part of the repair or rental items has been paid by defendant.

15. The record justifies the finding that the damage to plaintiff's building in excess of ordinary wear and tear during the period from March 9, 1936, when it was acquired by plaintiff, to the time it was vacated, plus the reasonable

rental value of the building during the time it was actually used and occupied by the defendant after October 1, 1938, amounted to $4,345.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This is a suit to recover the damages in excess of ordinary wear and tear to a six-story office building located in Oklahoma City, Oklahoma, and also the reasonable rental value of the building for the period during which it was occupied by an agency of the defendant after cancellation of the lease.

Plaintiff purchased the building March 9, 1936. At the time of the purchase it was being used by the Federal Works Progress Administration and its affiliated state and local agencies. The Federal Civil Works Administration and affiliated agencies began using the building in February 1934 under an arrangement by which the City of Oklahoma City paid $600 per month rent for the building. The Civil Works Administration had been organized under the Federal Emergency Relief Act (48 Stat. 55), and the executive orders issued pursuant thereto.

This act, with later amendments and later executive orders, made provision for acceptance of contributions by state and local authorities. Under these provisions the arrangements were made under the supervision and with the approval of Federal officials and the building and equipment were inventoried to the Federal agency. Later, and before the plaintiff purchased the building, the Civil Works Administration was changed to and became absorbed by the Federal Works Progress Administration which had full charge of the building and equipment at the time the plaintiff became the owner.

Prior to the time the plaintiff purchased the building it was owned by the Kansas City Life Insurance Company and had been rented under a memorandum agreement that was subject to renewal.

In December 1936 plaintiff became disturbed because of a lack of public liability insurance. After conferences a written lease agreement was entered into by the plaintiff and the United States which provided that the defendant should pay rent at the rate of $100 per month which it was estimated would be sufficient to cover liability insurance. This was supplemental to the regular rental that was being paid by the City of Oklahoma City. The Government lease provided for renewal from year to year and also stipulated that either party might terminate the lease at any time by giving 30 days' written notice.

The latter lease contained the usual provision for restoring the premises to the same condition as existed at the time of the making of the lease, reasonable and ordinary wear and tear excepted, and contained the further provision that if the lessor required such restoration she should give written notice thereof to the Government 30 days before the termination of the lease.

The lease was renewed the following year, but on August 23, 1938, the defendant gave notice that it would terminate the lease and vacate the property on and accept no responsibility for any rentals after September 30, 1938. Similar notice was given about the same time by the City of Oklahoma City, the reason given being that the Works Progress Administration would vacate the building by October 1, 1938.

On August 23, 1938, a representative of the plaintiff visited the building, talked to the man who was apparently in charge and who said he had taken the place of the superintendent of the building, and who advised plaintiff's representative that the defendant would repair the building and equipment and would restore them to good condition.

On October 17, 1938, representatives of the plaintiff and defendant met at the building for the purpose of determining what repairs would be required by plaintiff from the defendant because of damage done to the building and equipment during the period of occupancy. They were unable to agree on the amount. The plaintiff was asked to submit a list of the desired repairs, which she did shortly

thereafter. The claim finally submitted by the plaintiff was for a total of $13,325, which included repairs to the building in the amount of $7,025 and 9 months' rental of the building for the period October 1, 1938 to July 1, 1939, in the sum of $6,300. The list of repairs was made out by a firm of independent and experienced contractors who had erected the building. Their estimate included the amount necessary to completely recondition the building and restore it to approximately the same condition it was in prior to January 10, 1934. The defendant's regional engineer, after conferences with plaintiff's representative, made an investigation and estimated the damages to the building, other than normal wear and tear, as not exceeding $1,331. His estimate made no report as to the rental value of the building.

The defendant, while admitting that there were damages above ordinary wear and tear during the period of occupancy, nevertheless insists that plaintiff is not entitled to recover because she did not given written notice more than 30 days prior to the termination of the lease contract that she would require restoration. However, the conversations between representatives of plaintiff and defendant about what repairs would be required began the very day the notice of cancellation was given. Plaintiff was requested by defendant's representative on October 17, 1938, to submit a written list of the repairs which would be required, which she did soon thereafter. Defendant had an estimate made as to the amount of damages and the cost of restoration. At plaintiff's instance the firm which had constructed the building made an investigation, and submitted a detailed, written estimate covering essential repairs. Both parties had recognized before the premises were vacated that restoration would be required, and had acted on that basis from the day notice of cancellation was given. There was no delay in preparing estimates and an itemized list was submitted long before the premises were surrendered. We find that the provision for notice was substantially complied with. The major purpose of this type of notice is to convey knowledge of the demand to the opposing party before there is any change in the premises, to the end that the

damages and cost of restoration can be accurately determined. The representatives had full knowledge, they acted on such knowledge, and these acts show they did not intend to insist upon technical written notice. All the purposes of notice had thus been attained, if not in fact complied with. A provision for notice of this character can always be waived. By repeated conversations from the beginning, by requesting plaintiff to furnish a list of repairs, and by the conduct and statements of the parties throughout the period when the matter was under consideration, a formal written notice as such was manifestly waived.[1] It may be added that much of the damage was done in the moving operations. These took place weeks after the time when defendant contends plaintiff should have given notice. Advance notice was necessarily inapplicable to repairs on account of such damages.

At the time the agency of the defendant took charge of the building in 1934 it was approximately 4 years old, and while it had been vacant for some time, and the wooden flooring on the first and mezzanine floors needed cleaning, it was otherwise in good condition. The first floor was of maple, and the mezzanine was of pine. The other floors were of concrete and were covered with carpeting.

During the period of occupancy the building and equipment were damaged in many ways and the proof of the damaged condition at the time the premises were vacated is very direct and positive. The walls had been defaced, tile partitions and fixtures had been removed or disconnected, windows were broken, doors and door frames torn out, the wooden floors were in a rotting condition where water from the numerous coolers had been thrown, and several truck loads of broken glass, plaster, concrete, and other debris were piled up on the premises.

The photographs of record are graphic proof of the unusual damage that had been done, and this is borne out by the other evidence of injuries to the building and its equipment.

A considerable part of the damage was done when the operating agency and its equipment were being removed

[1] *Ford et al.* v. *The United States*, 17 C. Cls. 60; *Barlow et al.* v. *The United States*, 35 C. Cls. 514; *Rice* v. *Fidelity & Deposit Co. of Maryland*, 103 F. 427.

from the building to the new quarters, as is hereinafter set out more particularly. The structure had been erected as a business, and not as an office building. In order to suit it to the purposes of the Federal agencies, numerous partitions had been built and from time to time rearranged; holes had been cut in the walls to allow the installation of plumbing and ventilating equipment, and conduits for electric wires. Tile partitions had been removed and radiators removed or disconnected. Some of the toilet fixtures had been removed or replaced. A large air conditioning fan and an electric generator had been installed in the penthouse, and many other changes made in the fixtures and equipment.

When the moving began, according to the testimony of defendant's employees who had a part in the operations, instead of drawing the nails in the usual way, hammers and crowbars were used to hammer and pry out the partitions. That was one way to get them out. To one skilled in the craft the method may have seemed unorthodox, but after all, the partitions were removed.

To lighten the labor of loading, trucks were driven into the basement, backing into and scarring the walls.

In order to more easily remove the fan and generator from the penthouse the flooring was torn up and one entire side wall taken out. Leading from the roof down to the sixth floor was a concrete stairway and a balustrade with steel posts set in the concrete. A sledge hammer was used to knock down the balustrade, injuring it as well as damaging the stairway. Again, it must be admitted that battering down the wall and tearing up the floor, and hammering the banisters from the concrete stairway was a method of getting the fan and generator down from the roof. But to the architect who designed and to the skilled craftsmen who constructed the building and who estimated the damages, that method must have seemed somewhat brutal.

When asked why he had used such methods the reply of the man in charge was that they were in a hurry. They moved. That much is certain. The scarred building, broken walls, shattered glass and piles of debris were physical evidence that they may have been in a hurry. However,

since the moving began the first of October and was not completed until several weeks later, the time element is not so convincing.

The defendant claims that, in determining ordinary wear and tear, consideration must be given to the type of organization which was using the building. That is conceded, but we are unwilling to believe that the treatment of this particular building was typical of the attitude of the Works Progress Administration everywhere. There is nothing in the record to justify any such conclusion. The fact that this agency has lasted through the years, with public support through annual appropriations, and the fine work done by it in many localities, which is a matter of common knowledge, if affording any basis for an inference at all, indicates that its handling of property generally must not have been of the character shown here.

The ruthless method used by this agency in the removal from this particular building indicated an almost reckless disregard of the value of property.

All property other than natural resources is the product of toil and the expenditure of human energy. In every economic system there are defects which need correction, but there are orderly, even creative, ways of readjustment and of thus achieving a desirable purpose. That purpose is never furthered by destructive practices.

The plaintiff contends that she is entitled to the damage that occurred before March 9, 1936, and after February 1934, since there was an obligation on the part of defendant at the time the agencies entered the building to restore it to its original condition at that time. This claim cannot be allowed because for the period prior to plaintiff's purchase of the property her claim would be under an assignment.[2] There was no privity of contract, express or implied, between plaintiff and defendant covering the period prior to the time the plaintiff became the owner of the property in question. Any ordinarily prudent person in purchasing property takes into consideration its condition at the time of the purchase. It is reasonable to assume that plaintiff did so.

[2] 31 U. S. C. A. 203.

Plaintiff also claims that since the keys to the building were not delivered to her and therefore she was not technically given possession of the building until July 1, 1939, she is entitled to recover the reasonable rental value of the building from October 1, 1938 to July 1, 1939, which reasonable rental value she alleges to be $700 per month, a total of $6,300.

The claim for rental payments for the property cannot be sustained for the period after the defendant had completely vacated the premises. It is true that neither she nor her representative was given physical possession of the key, but no demand was made therefor. It is doubtful, in view of the testimony of plaintiff's representative, whether she particularly desired the key before the negotiations regarding the restoration of the building were further along. At any rate, there is no evidence of any further use of the building by the defendant, or of any intentional withholding of the key to the premises.

Considering the whole case we feel that the amount which we are allowing is not sufficient to compensate for the restoration cost on account of the damages in excess of ordinary wear and tear that were caused during the period of plaintiff's ownership and defendant's occupancy, and to pay the rental on the building for the period during which it was actually occupied after rental payments had ended, but the uncertainty as to when a part of the damages occurred and the lack of proof as to some of the items prevent us from giving plaintiff full compensation.

After eliminating all damages that occurred prior to March 9, 1936, considering only the repairs made necessary on account of damages occurring after that date, and charging defendant with the reasonable rental value of the building only for the period of actual use and occupancy after the cancellation date, we find there is due plaintiff the sum of $4,345.

Judgment will be entered in favor of plaintiff in the sum of $4,345. It is so ordered.

Madden, *Judge;* Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

GERALD JACOB PEIFFER v. THE UNITED STATES

[No. 45297. Decided June 1, 1942]

On the Proofs

Pay and allowances; enlisted man entitled to, only for term of enlistment; term of enlistment defined.—An enlisted man is not entitled to pay and allowances beyond the term of his enlistment; but term of enlistment does not expire until he is discharged by proper military authorities.

Same; enlisted man in Navy retained for medical observation and treatment beyond expiration date of the period for which he enlisted.—Where prior to termination of the period for which an enlisted man enlisted he reported for physical examination preliminary to discharge, and was retained beyond expiration date of this period for medical examination and treatment, he was entitled to his pay and allowances until discharged; and where disability is waived and enlisted man reenlists, he is entitled to pay and allowances between the expiration date of his first enlistment and the date of his reenlistment.

Same; discharge postponed beyond date of enlistment termination.—An enlisted man in the Navy continues subject to military discipline until discharged, even if the date of his discharge is postponed beyond the termination of his term of enlistment; and he may not leave the service until discharged.

There is no absolute obligation upon the military authorities to discharge a man as soon as his term of enlistment has expired.

It is a necessary preliminary to the discharge of an enlisted man that he be physically examined.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. E. Leo Backus, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, on the basis of an agreed statement of facts:

1. The plaintiff, Gerald Jacob Peiffer, first enlisted in the United States Navy on December 17, 1925, and served on active duty continuously until December 16, 1939. On December 16, 1939, he held the rating of radioman, first class.

2. On December 14, 1939 plaintiff reported to the Dispensary, Navy Yard, Washington, D. C., for examination and discharge from his then current term of enlistment. The medical authorities believed that he was suffering from glycosuria, which disease had not been incurred as a result of his own misconduct, but he was sent on that date to the Naval Hospital, Washington, D. C., for further examination and treatment. He remained at the hospital until December 28, 1939. On December 22, 1939, it was determined by the medical authorities that the original diagnosis of his disease was erroneous, but that he was suffering from diabetes mellitus, not resulting from his own misconduct. A waiver for reenlistment was requested, and on December 28, 1939 he reenlisted for a term of six years, remaining, however, on the sick list. He is now serving under that contract of enlistment.

3. Plaintiff's then current term of enlistment ended December 16, 1939. He was not discharged on that date, but was held in said hospital beyond the expiration of his enlistment for examination and treatment. There is no record of any protest having been made by plaintiff against his detention beyond the expiration of his term of enlistment.

The plaintiff was desirous of reenlisting, and his meeting with all the physical requirements to the satisfaction of the medical authorities at the Naval Hospital was a prerequisite for such reenlistment.

It was a necessary preliminary to discharge that plaintiff's physical condition be ascertained, and if a disability were discovered it was necessary to determine whether or not it had been incurred in line of duty.

4. Plaintiff did not receive any pay or allowances during the period he was in the hospital, viz., from December 17, 1939 to December 27, 1939, inclusive. If entitled to the pay and allowances of a radioman, first class, credited with his length of service during the period from December 17, 1939 to December 27, 1939, inclusive, there is due him the sum of $45.10, as computed by the General Accounting Office.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit by an enlisted man in the Navy for pay and allowances between the date of the expiration of his term of enlistment, December 16, 1939, and the date he reenlisted, December 28, 1939, during which time he was detained by the Navy in the Naval Hospital at Washington, D. C., for examination and treatment.

On December 14, 1939 he reported for physical examination preliminary to being discharged from his then current term of enlistment. In the opinion of the examining physicians at that time, he was suffering with a disease known as glycosuria, but he was sent to the Naval Hospital at Washington for further examination and treatment.

On December 22, 1939, six days beyond the termination of his term of enlistment, his disease was diagnosed as diabetes mellitus. He was not then discharged, however, but was further detained until December 28, 1939, when he reenlisted for a term of six years.

It is, of course, true that the plaintiff is not entitled to pay and allowances beyond the end of his term of enlistment unless there is statutory authority therefor.

Section 181 of title 34 of the United States Code provides for enlistments in the Navy for terms of two, three, four, and six years, but it has been true as long as we have had a Navy that an enlisted man continues subject to military discipline until discharged, even though the date of his discharge is postponed beyond the termination of his term of enlistment. He may not leave the service until discharged. One reason for this is illustrated by section 183 of title 34 of the United States Code, which provides that an enlistment is not complete until the enlisted man shall have made good time lost on account of injury, sickness, or disease resulting from his own misconduct. Before a man may leave the military service the proper authorities must determine that he is entitled to do so. Until they do make this determination, his enlistment is not complete.

Section 201 of title 34 of the United States Code, R. S. sec. 1422, as amended, furnishes statutory authority for retaining an enlisted man in the Navy beyond the termination date of his enlistment, under some circumstances. This

section requires the enlisted man's commanding officer to send him ashore when his time of enlistment has expired, if he so requests, in order that he may be discharged; but this is not an absolute requirement. He must be sent ashore at the termination of his enlistment, "or as soon thereafter as may be." The requirement is further qualified by authorization to the commanding officer to retain him for a longer period if he should be of opinion that his retention is "essential to the public interests." In such case he may be detained until the vessel returns to the proper port. Nor must he be discharged immediately upon arrival in port. It is provided that "all persons so detained by such officer * * * shall in no case be held in service more than thirty days after their arrival in said port." By implication the commanding officer may detain the enlisted man for as long as thirty days after the vessel has returned to the proper port.

The section provides that during such detention the enlisted man "shall be subject in all respects to the laws and regulations for the government of the Navy." And it further provides that they "shall receive for the time during which they are so detained * * * an addition of one-fourth of their former pay * * *."

There is no absolute obligation upon the military authorities to discharge a man as soon as his term of enlistment has expired.

It is a necessary preliminary to his discharge that the man be physically examined. This is for the reason that men contracting injury or disease in line of duty are entitled under the law to pensions or compensation; hence, before a man leaves the service it must be determined whether or not he is suffering from a disability entitling him to a pension. The plaintiff reported for this examination. It was discovered that he was suffering from some disease which the doctors at first diagnosed as glycosuria; but evidently they were in some doubt about this diagnosis because they sent him to a hospital for further examination. He remained there for six days beyond the termination of his period of enlistment, when, after further examination, they came to the conclusion that he was suffering from diabetes mellitus.

Having determined that he was disabled, it was their further duty to determine whether or not this disability had been incurred in line of duty, for the purpose of determining whether or not the man was entitled to a pension.

The plaintiff was further detained for six more days, until December 28, 1939, when, at his request, his disability was waived and he reenlisted. Whether this further detention was for further examination, or for determining whether or not the disease had been contracted in line of duty, or for treatment, does not appear.

According to the custom and laws of the military service, plaintiff's superior officers had a right to detain him; his term of enlistment did not expire until he was discharged. So long as his enlistment had not expired, he was entitled to the pay and allowances provided for his grade.

The Comptroller of the Treasury on December 4, 1919 (26 Comp. Dec. 447) held that an enlisted man, detained for treatment at a hospital after the expiration of his enlistment, was entitled to pay and allowances until the date of his actual discharge. This was based upon a Navy regulation (Article 1190 (4), U. S. Navy Reg. 1920, as amended by C. N. R. No. 3), which provided that enlisted men so held are held for the convenience of the Government. This continued to be the practice for twenty years, until August 26, 1939, when the Comptroller General reversed the former holdings and held that an enlisted man so held was being held "primarily for the benefit of the man concerned," and that, therefore, he was not entitled to pay and allowances during such period (19 Comp. Gen. 290). When this decision was announced the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury recommended the passage of an Act to provide for pay and allowances where a man was detained in a hospital for treatment after the expiration of the period of his enlistment, and this Act was passed by Congress and approved by the President on December 12, 1941 (S. 165, 77th Cong., 1st Sess.) (55 Stat. 797).

Retention for treatment is not only for the benefit of the man concerned, but it is also for the benefit of the

Government. Treatment may correct the disease and save the Government from liability for a pension. Since his enlistment did not expire until discharged, it must follow that he is entitled to pay and allowances until discharged. Plaintiff was retained both for treatment and examination. We are satisfied that the Navy had the right to retain him for such a purpose, and for the time so retained we are satisfied he is entitled to his pay and allowances.

It has been agreed that if the plaintiff is entitled to recover at all, he is entitled to recover the sum of $45.10. We think he is entitled to recover, and judgment will be entered for this sum. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

VINCENT LENTINI v. THE UNITED STATES

[No. 45294. Decided June 1, 1942]

On the Proofs

Pay and allowances; unmarried officer in Army with dependent mother.—Upon the facts submitted to the court, it is *held* that plaintiff, then an unmarried officer in the Reserve Corps, U. S. A., on active duty, was the chief support of his widowed mother for the periods from November 18, 1935, to December 10, 1937, inclusive, and from August 15, 1938, to January 24, 1939, inclusive, and is accordingly entitled to recover for rental and subsistence allowances.

The Reporter's statement of the case:

Mr. M. C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Vincent Lentini, accepted an appointment as First Lieutenant, Medical Section, Officers' Reserve

Corps, on August 15, 1934. He held this rank until December 22, 1938, when he was promoted to Captain, Medical Section, Officers' Reserve Corps, effective December 27, 1938.

2. Plaintiff's father, Joseph Lentini, died January 26, 1930. He left no will. At the time of his death plaintiff's father was engaged in the grocery business and owned a house and lot, some jewelry and furniture. The grocery business was sold in 1930 for $1,000, from which amount the father's funeral expenses were paid, and the remainder used in paying off the debts incurred by the father. The house and lot were sold in March 1935 for $900, and the jewelry was sold for old gold for approximately $200. The entire amount of money referred to was used for the purposes stated before November 18, 1935, the date of the commencement of the plaintiff's claim.

3. Plaintiff's mother, Cecilia Lentini, was born April 27, 1877. She did not remarry after the death of plaintiff's father. Plaintiff had one sister, now 36 years of age, and no brother. The sister contributed nothing to the support of her mother.

4. During the period of this claim, plaintiff's mother owned no property and had no income other than that contributed by the plaintiff. She lived in a house, the rent of which was $22.50 a month, until some time in 1938, when the rent was raised to $27.50 a month, and was paid out of the contributions by the plaintiff.

Plaintiff's sister lived with her mother and paid her $10 a month for room and board.

5. Plaintiff was the sole support of his mother during the entire period of his claim, and contributed regularly an average of $75 a month for her support. Sometimes the contributions were made by check and sometimes, when he visited his mother, they were made by cash.

6. Plaintiff claims rental and subsistence allowances on account of a dependent mother for the periods from November 18, 1935 to December 10, 1937, inclusive, and from August 15, 1938 to January 25, 1939, on which latter date he was married.

7. Plaintiff occupied public quarters, consisting of one room, during the period of his claim, except for the period from November 18, 1935 to November 28, 1935, inclusive, during which period he occupied private quarters at his own expense.

8. Plaintiff's mother did not occupy public quarters at any time during the period of plaintiff's claim.

9. Plantiff has never been paid rental and subsistence allowances on account of a dependent for any part of the periods of his claim. He submitted a claim to the General Accounting Office for rental and subsistence allowances on account of a dependent mother, but the claim was disallowed on the ground that the evidence submitted to that office did not establish that plaintiff's mother was in fact dependent upon him for her chief support.

10. If plaintiff's mother was in fact dependent upon him for her chief support for the periods from November 18, 1935 to December 10, 1937, inclusive, and from August 15, 1938 to January 24, 1939, inclusive, there would be due the plaintiff as rental and subsistence allowances the sum of $1,668.86.

The court decided that the plaintiff was entitled to recover.

Opinion *per curiam:*

A statement of the facts is all that is necessary to show that there can be no question at all about plaintiff's right to recover. The defendant does not contest it. The claim was disallowed by the General Accounting Office because the evidence submitted to that office did not establish that plaintiff's mother was in fact dependent upon him for her chief support. What evidence was submitted to that office, we do not know, but the evidence submitted to us leaves no doubt that plaintiff was his mother's chief support; in fact, she had no other income whatever.

Plaintiff is entitled to recover of the defendant the sum of 1,668.86, for which judgment will be entered. It is so ordered.

GEORGE SCRATCHLEY v. THE UNITED STATES

[No. 45536. Decided June 1, 1942]

On the Proofs

Pay and allowances; effective date of retirement of Navy officer.—Where plaintiff, a lieutenant commander, United States Navy, was retired for disability incident to the service, in conformity with the provisions of U. S. Code, Title 34, section 417, after more than 27 years of service but less than 30 years; it is *held* that the date recommended by the Naval Retiring Board as the time when the plaintiff should be retired and approved by the President was the effective date of plaintiff's retirement, and not the date of the President's approval of the recommendation of the Board and the Secretary of the Navy, and the plaintiff is accordingly entitled to recover.

Same.—On similar facts the Court of Claims has so held in the cases of *James A. Greenwald, Jr.* v. *United States*, 88 C. Cls. 264; *Henry M. Butler* v. *United States*, 91 C. Cls. 88, and other recent cases.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was on the brief.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, pursuant to the stipulation of the parties:

1. The plaintiff served as an enlisted man in the United States Navy from June 21, 1909, to June 20, 1913, and from July 23, 1913, to July 8, 1917. On July 9, 1917, he accepted temporary appointment as an Acting Pay Clerk; accepted permanent appointment as an Acting Pay Clerk on December 17, 1917; and thereafter served continuously on active duty as an officer of the United States Navy until August 1, 1936, when he was transferred to the retired list with the rank of lieutenant commander, which rank he had attained on the active list.

2. On March 11, 1936, orders were issued by the Secretary of the Navy which directed the plaintiff to report before a Naval Retiring Board, Navy Yard, Mare Island, California, for examination for retirement. The plaintiff reported as

directed, and the Board after due consideration of his case found that he was incapacitated for active service; that his incapacity was permanent and incident to the service.

3. The proceedings and findings of the Naval Retiring Board were forwarded to the Secretary of the Navy who, on May 26, 1936, transmitted them to the President with the recommendation that they be approved and that plaintiff be retired from active service on August 1, 1936, and placed on the retired list in conformity with the provisions of the United States Code, Title 34, Section 417. On May 27, 1936, the President approved the findings of the Naval Retiring Board and the recommendation of the Secretary of the Navy.

4. On June 9, 1936, the Chief of the Bureau of Navigation advised plaintiff as follows:

> 1. The Naval Retiring Board before which you appeared found you incapacitated for active service by reason of psychoneurosis psychasthenia; that your incapacity is permanent, and is incident to the service.
> 2. The President of the United States, under date of 27 May, 1936, approved the proceedings and findings of the Naval Retiring Board in your case, and on 1 August, 1936, you will, in accordance with his direction, regard yourself as having been transferred to the retired list of officers of the Navy from that date, in conformity with the provisions of U. S. Code, Title 34, Section 417.
> 3. The Bureau regrets that disability has interrupted your career of active service.
> 4. Acknowledgment of receipt is requested.

5. Plaintiff completed 27 years' service for pay purposes on July 22, 1936. He claims active duty pay for an officer of his rank with more than 27 but less than 30 years' service from July 23, 1936, to August 1, 1936, and retired pay on that basis from August 1, 1936; this claimed increase having been withheld by the Comptroller General on the ground that plaintiff's retirement became effective on May 27, 1936, the date on which the President approved the findings of the Naval Retiring Board and the recommendation of the Secretary of the Navy, rather than on August 1, 1936, when under the President's order his retirement became effective.

6. If it is held that plaintiff is entitled to active duty pay based on all service performed by him prior to August 1, 1936, there is due him for the period from July 23, 1936,

to July 31, 1936, inclusive, the difference in active pay between $422.92 a month, applicable to a lieutenant commander, United States Navy, with over 27 but less than 30 years' service, and $408.33 a month, received by him as an officer of that rank with more than 24 but less than 27 years' service, 8 days at $14.59 a month, or $3.89. If entitled on and after August 1, 1936, to retired pay based on all service performed by him prior to that date, he is entitled to the difference between $317.19 a month, the retired pay of a lieutenant commander, United States Navy, with more than 27 but less than 30 years' service, and $306.25 a month received by him as a retired officer of that rank based on more than 24 but less than 27 years' service, from August 1, 1936, to June 30, 1941 (the date of the latest available pay roll on file in the General Accounting Office), 4 years and 11 months at $10.94 a month, or $645.46. This is a continuing claim.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff is a Naval Officer who was found by the Naval Retiring Board to be incapacitated for active service. The proceedings and findings of the Board were forwarded to the Secretary of the Navy who on May 26, 1936 presented them to the President with the recommendation that they be approved and the plaintiff be retired from the active service on August 1, 1936. On May 27, 1936 the President approved the findings of the Board and the recommendation of the Secretary of the Navy.

The sole question in the case is whether the plaintiff was retired May 27, 1936 when the President approved the findings of the Board and its recommendation; or on August 1, 1936, the date recommended by the Board and the Secretary of the Navy for his retirement.

Manifestly the date recommended by the Board as the time when the plaintiff should be retired and approved by the President, was the date of plaintiff's retirement; and not the date of the President's approval of the recommendation of the Board and the Secretary of the Navy.

On similar facts this court has so held in the cases of *James A. Greenwald, Jr.*, v. *The United States*, 88 C. Cls. 264, and *Henry M. Butler* v. *The United States*, 91 C. Cls. 88, and other recent cases.

The plaintiff is entitled to recover but the case is a continuing one and judgment will be suspended awaiting a report from the General Accounting Office showing the amount due plaintiff; at that time judgment will be entered in accordance with the findings and this opinion.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

In accordance with the above decision and upon a report from the General Accounting Office showing the amount due thereunder, the court on October 5, 1942, entered judgment for the plaintiff in the sum of $766.16.

HAZEL L. FAUBER, ADMINISTRATRIX, C. T. A., v. THE UNITED STATES

[No. 41941. Decided June 1, 1942]

On Defendant's Motion for a New Trial

Patents for hydroplane boats; assignment of exclusive rights in a limited field; after-discovered evidence.—Held that the alleged newly discovered evidence presented on defendant's motion for new trial, consisting of a published article: (1) is not newly discovered evidence; (2) contains no disclosure anticipatory of Claim 4 of the patent in suit; (3) the disclosures in the said article are merely cumulative of the prior art disclosures originally before the court and duly considered and passed upon in the findings and opinion (93 C. Cls. 11); and (4) if the said article were in evidence as a part of the record in the prior art, its disclosure would not change the result originally reached by the Court.

The Reporter's statement of the case:

The decision in this case was rendered March 3, 1941 (93 C. Cls. 11), holding that the plaintiff was entitled to recover but entry of judgment was withheld until the taking of evidence on accounting, showing the amount of compensation due, had been completed.

On April 10, 1942, the defendant filed a motion for new trial under section 175 of the Judicial Code; Title 28 U. S. C., section 282.

In this case plaintiff claimed $2,000,000 as compensation for the alleged unauthorized use by the defendant of two United States patents issued to William H. Fauber, now deceased, in 1910 and 1912, for a "Hydroplane Boat" and for "Construction of Boats and Ships," respectively. It was contended that certain inventions described and claimed in these patents were embodied and used by the defendant in the construction of certain hydroaeroplanes. Defendant contended, first, that the claims of both patents in suit are invalid because anticipated by the prior art; and, second, that none of the claims in suit has been infringed by any of the defendant's structures.

The Court decided as a conclusion of law that Claims 1, 2, 5, and 6 of the plaintiff's first patent, 971,029, and Claims 1, 2, and 29 of plaintiff's second patent, 1,024,682, are invalid; that Claim 4 of plaintiff's second patent is valid and has been infringed by the United States; that Claim 5 of the second patent is valid but has not been infringed; and that plaintiff is entitled to compensation for the unauthorized use by the United States of the invention disclosed in Claim 4 of plaintiff's patent 1,024,682 under the act of June 25, 1910, 36 Stat. 851, as amended by the act of July 1, 1918, 40 Stat. 705 and section 155 of the Judicial Code.

On June 1, 1942, defendant's motion for a new trial was overruled in an order as follows:

ORDER

Overruling Defendant's Motion for a New Trial

The defendant has filed a motion for a new trial upon alleged newly discovered evidence in the prior art with reference to the finding, opinion, and decision of the court published March 3, 1941, holding Claim 4 of the patent, No. 1,024,682, valid and infringed. This alleged newly discovered evidence consists of an article entitled "Notes on the Form of High-Speed Ships" of A. E. Long, M. A., in a publication entitled "International Marine Engineering" of June 1908. This article and the affidavits accompanying the motion for a new trial have been considered and the court finds that (1) the article is not newly discovered

evidence; (2) it contains no disclosure anticipatory of Claim 4 of the patent in suit; (3) the disclosures in the article are merely cumulative in the prior art disclosures originally before the court and duly considered and passed upon in the findings and opinion (finding 19; Deft.'s Ex.'s 6–A and 6–B); and (4) if the A. E. Long article were in evidence as a part of the record on the prior art, its disclosure would not change the result originally reached by the court in the original findings, opinion, and judgment of March 3, 1941. *Eclipse Machine Co., et al.* v. *Harley-Davidson Motor Co., et al.*, 286 Fed. 68; *Gillette Safety Razor Co.* v. *Triangle Mechanical Laboratories Corp.*, 15 Fed. Supp. 95; *Stewart-Warner Corp.* v. *Levally*, et al., 16 Fed. Supp. 778; *Activated Sludge, Inc., et al.* v. *Sanitary District of Chicago*, 33 Fed. Supp. 692. Wherefore,

It is ordered, adjudged, and decided this June 1, 1942, that the defendant's motion for a new trial be, and the same hereby is, overruled.

MORRIS S. HAWKINS AND L. (LOUIS) H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY v. THE UNITED STATES

[No. 43452. Decided March 2, 1942. Defendant's motion for new trial overruled June 29, 1942]

On the Proofs

Recovery under special Jurisdictional Act; removal of drawbridge under War Department orders.—Where the Norfolk Southern Railroad was the owner of the right of way over the Albemarle & Chesapeake Canal and had constructed and used a bridge and fender system over said canal; and where said canal was purchased from its private owners by the United States, under authority of Congress; and where, in the development of the intracoastal waterway, the Government deepened and widened said canal; and where in accordance with said development the Government ordered, after hearing, the said railroad to remove the said bridge and fenders or to alter same so as to provide a draw opening between the fenders of at least 80 feet; and where said railroad, after extension of time had been granted, complied with said order and constructed a new drawbridge and fenders in accordance with

plans submitted to the Government; it is *held* that under the provisions of the special Jurisdictional Act of February 11, 1936, plaintiffs as receivers of said Norfolk Southern Railroad Company are entitled to recover.

Same; constitutional power of Congress; navigation.—It is well settled law that, under the clause of the Constitution to regulate commerce (Article 1, section 8, clause 3), Congress has the power to free navigation from unreasonable obstructions by compelling the removal of bridges which obstruct navigation.

Same; taking of private property.—Requiring the removal or alteration of unreasonable obstructions is not taking private property for public use within the meaning of the Constitution. *Union Bridge Company* v. *The United States*, 204 U. S. 364, cited.

Same; compensation.—The order of removal of the old bridge and the election of the railroad to erect a new bridge in accordance with the plans of the War Department did not require compensation to be paid to the railroad and said order was within the powers delegated to the Secretary of War by the provisions of section 18 of the Act of March 3, 1899, 30 Stat. 1121.

Same; subsequent legislation.—When several acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, and cases therein cited.

Same; creation of liability by enactment of special Jurisdictional Act.—In the enactment of the Jurisdictional Act, conferring upon the Court of Claims jurisdiction to hear, determine, and render judgment upon the claim of plaintiffs in the instant case, it is *held* that it was the intention of Congress to create a liability where theretofore there was no liability.

The Reporter's statement of the case:

Mr. C. B. Garnett for the plaintiffs. *Mr. S. Burnell Bragg* was on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Elihu Schott* was on the briefs.

The court made special findings of fact as follows:

1. Suit herein is brought under the Act of February 11, 1936, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the

Court of Claims of the United States, notwithstanding any limitations upon the jurisdiction and power of such court, to hear, determine, and render judgment upon the claim of the Norfolk Southern Railroad Company against the United States, arising out of or incident to the removal of an old bridge and the construction of a new drawbridge and fender system over the Albemarle and Chesapeake Canal, now the Virginia cut of the Inland Waterway, near Great Bridge, Virginia, to comply with orders of the War Department (49 Stat. 2217).

2. By appointment of the District Court of the United States for the Eastern District of Virginia, plaintiffs are the receivers of the railroad company named in the jurisdictional act, the Norfolk Southern Railroad Company, hereinafter referred to as the "Norfolk Southern." The Norfolk Southern is a common carrier, engaged in state and interstate commerce.

3. The Albemarle & Chesapeake Canal is, and always has been, an artificial, navigable waterway. The section thereof particularly involved in this case is in the county of Norfolk, in the State of Virginia, connecting the southern branch of Elizabeth River with the headwaters of North Landing River, and with Currituck Sound. The section in the county of Norfolk was constructed by the Albemarle & Chesapeake Canal Company pursuant to an act of the general assembly of the Commonwealth of Virginia March 15, 1850, and subsequent acts, which gave to that company the right to take and pay for the necessary land, to cut the canal, and to collect tolls.

Thereafter, September 19, 1877, there was incorporated under the laws of Virginia a corporation styled "The Centreville Turnpike Company" for the purpose of building and operating a turnpike road in the county of Norfolk, of the width of not less than 25 feet nor more than 40 feet, "with the privilege," as the charter recited, "of erecting a drawbridge over the Albemarle and Chesapeake Canal with the consent of the Albemarle & Chesapeake Canal Company as to the terms and conditions upon which the said bridge may be built and kept and continued over the said canal; and with the privilege of charging and collecting tolls upon

passengers, vehicles, horses, and other animals and livestock passing over the said turnpike road or any part thereof." By its charter the company was given the right to "own and hold land in Norfolk County, Virginia, sufficient for the construction and operation of the said Turnpike Road * * * and no more, to be used in furtherance of its objects."

The Centreville Turnpike Company, June 22, 1880, conveyed to The Elizabeth City & Norfolk Railroad Company its franchise, and the land constituting its right of way, then 40 feet wide. In 1883 the name of the railroad company was changed to Norfolk Southern Railroad Company.

The strip of land 40 feet wide, thus conveyed to the railroad company, was thereafter made a continuous way for rail traffic by a drawbridge erected over the Albemarle & Chesapeake Canal, near Great Bridge, Virginia. On March 22, 1890, the canal company, by deed, conveyed to the railroad company the use of a strip of land northwesterly alongside the 40-foot wide strip, "as a way for its railroad, trains, etc.," 35 feet wide, thus enlarging the rail way over the canal and the approach thereto to a width of 75 feet. At the time of this conveyance the drawbridge was on the 40-foot strip. A copy of the instrument of conveyance is filed in evidence as plaintiff's Exhibit No. 1, and is made part hereof by reference.

The premises were described in the deed as follows:

> All that certain lot, piece, or parcel of land situate in Norfolk County, Virginia, on or near the canal of the grantor, and butted and bounded as follows, to wit: Beginning at a point on the boundary line between the lands of the Albemarle and Chesapeake Canal Company and the Norfolk Southern Railroad Company (said point being the Northwesterly corner of the intersection of the right-of-way of the Norfolk Southern Railway Company with said boundary line), thence along said boundary line, in a Northwesterly direction, 35 feet; thence North in a line parallel with the present center line of the railroad of said Railroad Company and 55 feet distant therefrom, 730 feet to an intersection with the present right-of-way line; thence South along said old right-of-way line 730 feet to the place of beginning,

containing 36/100 acre, more or less, exclusive of water-surface in canal 8/100 as will be shown on the diagram hereto annexed and made a part of this deed.

The deed further provided:

> This deed is made and accepted upon the understanding and agreement that if the party of the second part [Norfolk Southern] shall at any time permanently discontinue the use of the right-of-way above granted for railroad purposes, the same shall revert to the party of the first part [Albemarle & Chesapeake Canal Co.] as of its first estate.

4. In 1891 the Norfolk Southern erected a new drawbridge on the 35-foot strip for use in place of the older bridge on the 40-foot strip. The channel of the canal at that time was about 50 feet wide and 8 feet deep. The fender system, protecting the new bridge from damage by navigation, and also guiding navigation, extended over and beyond the 75-foot limit of the rail way as extended across the canal. This fender system had a clearance for navigation of 46 feet 3 inches. The new drawbridge was of a bobtail type, shorter on one side of its pivot than the other, each side made the same weight by a counterbalance and when swung open was within and protected by the fender system. The bridge so erected in 1891 was designed for Cooper's E-40 loading, being a load of 4,000 pounds per linear foot. The abutments extended on to the 40-foot strip.

5. On March 19, 1913, the United States acquired the Albemarle & Chesapeake Canal cut and right-of-way by purchase from the Chesapeake & Albemarle Canal Co., successors in title to the Albemarle & Chesapeake Canal Co. This purchase was authorized by the River & Harbor Appropriation Act of July 25, 1912, 37 Stat. 201, 206. The Virginia cut, involved in this suit, extended generally 150 feet on each side of the canal, measured from the center line of the channel. At the time of purchase the canal had locks at Great Bridge, between the railroad bridge and Elizabeth River, which controlled the flow of tidal water therefrom. These locks were removed by the Government in or about the year 1916, as a result of which removal the canal under the railroad drawbridge became a tidewater canal.

6. The following notice was delivered by the War Department to the Norfolk Southern on or about February 14, 1921:

WAR DEPARTMENT,
Washington, D. C., February 14, 1921.

To the PRESIDENT, NORFOLK SOUTHERN RAILROAD COMPANY,
Norfolk, Virginia.

TAKE NOTICE THAT—

WHEREAS, The United States is engaged in the work of deepening the Inland Waterway from Norfolk, Virginia, to Beaufort Inlet, North Carolina, in accordance with a project adopted by Congress in the River and Harbor Act of July 25, 1912, which project requires a clear width of not less than eighty feet between fenders in the draw span for all bridges crossing said waterway;

AND WHEREAS, The land out of said waterway in the State of Virginia, acquired by purchase by the United States from the Albemarle & Chesapeake Canal Company in pursuance of authority contained in the Act of Congress aforesaid, is crossed by the Norfolk Southern Railroad by means of a bridge near Fentress, Virginia, the draw span of which bridge is of inadequate width to meet the enlarged width of the said waterway, thus constituting said bridge an unreasonable obstruction to the free navigation of a navigable waterway of the United States within the meaning of Section Eighteen of an Act of Congress entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899;

AND WHEREAS The following alteration, which has been recommended by the Chief of Engineers, is required to render navigation through or under said bridge, upon completion of the aforesaid project of improvement, reasonably free, easy and unobstructed, that is to say, provide a draw opening at least eighty feet wide between fender protections, measured horizontally and perpendicularly to the channel, or in lieu thereof wholly to remove said bridge;

AND WHEREAS, Also, said bridge is entirely within and upon lands now owned in fee by the United States;

AND WHEREAS One year from the date of the service of this notice is a reasonable time in which to alter or remove the said bridge as described above;

NOW THEREFORE, In obedience to, and by virtue of said Section Eighteen of the Act of Congress approved March 3, 1899, and having regard to the fact, heretofore adverted to, that the bridge hereby required to be altered or removed lies entirely within lands now owned in fee by the United States, the Secretary of War (having first given the parties reasonable opportunity to be heard as required by said section) does hereby notify the said Norfolk Southern Railroad Company to alter or remove the said bridge as described above, and prescribes that said alteration or removal shall be made and completed within one year from the date of service hereof.

(Signed) W. R. WILLIAMS,
Assistant Secretary of War.

The Norfolk Southern protested against carrying out this order at the time set, stating that it was then unable to finance the project. In response to this protest the Secretary of War extended the time for completion to March 1, 1924. The railroad company again requested an extension of time, and in response to the second request the Secretary of War advised the railroad company in writing February 7, 1924, as follows:

Referring to your request of December 3, 1923, addressed to the District Engineer, Norfolk, Va., for an extension of the time for altering the bridge of the Norfolk Southern Railroad Company near Fentress, Va., across the Inland Waterway from Norfolk, Va., to Beaufort Inlet, N. C., under the requirements of War Department notice of February 14, 1921, you are hereby informed that the time fixed in said notice for completing the work, as extended by letter dated October 10, 1921, is hereby further extended to March 1, 1926, on condition that said Company shall construct and complete on or before June 1, 1924, a fender system in accordance with the plan herewith, and to the satisfaction of the United States District Engineer in charge of the locality, otherwise this extension to be null and void.

7. Shortly after the United States acquired the canal the War Department, except at the railroad bridge, widened and deepened it, creating a channel 90 feet wide and making the canal 12 feet deep. At the railroad bridge the dimensions were for the time being left as they were. This

situation created a raceway between the fenders when tide and wind were adverse and made passage therethrough difficult for larger craft. The condition imposed by the Secretary of War February 7, 1924, as a prerequisite to extension of time (see Finding 6), was an attempt to moderate this hazard in navigation.

The chief engineer of the Norfolk Southern suggested to the Army engineers that the difficulty might be alleviated by enlarging the channel at the site of the drawbridge to the new standard dimensions, that is to say, 90 feet wide, 12 feet deep, thus making uniform the flow of water, and by extending the outer limits of the fenders to the outer edges of the enlarged channel. The communication embodying this suggestion, dated April 16, 1924, added:

> The Railroad Company is willing to make such changes as it may find necessary in its trestle spanning this canal to accommodate itself to the new conditions, assuming that the Government will do this work at its expense in the same manner that the other portion of the canal was dredged. The Railroad Company expresses its willingness to permit the Government to dredge across its right-of-way as shown on the map herewith, without any cost to the Government for such lands. The Railroad, by its condemnation proceedings secured not only the rights of way for the highlands, but also water rights on its first 40-foot strip, and the rights to the highlands on its second right-of-way of 35 feet.

8. On June 13, 1924, the acting Secretary of War addressed the Norfolk Southern by letter as follows:

> Reference is made to your request of April 16, 1924 (your file 1–E–5), addressed to the District Engineer, Norfolk, Va., for a modification of Department requirements relative to altering the bridge of the Norfolk Southern Railway Company crossing the Federal Inland Waterway near Fentress, Va.
>
> In reply you are hereby informed that the date for completing the alterations of said bridge required by War Department notice of February 14, 1921, continues as specified in my letter of February 7, 1924, namely March 1, 1926.

The requirement in the said letter of February 7, 1924, concerning the construction of the fender system is hereby modified as follows:

That the Norfolk Southern Railroad Company shall grant to the United States without charge, and in form satisfactory to the Secretary of War, the right to dredge across the right-of-way of the said Company at said bridge to such width as may be necessary for the operations of the dredge in enlarging the cross section of the canal to the standard dimensions; shall also, within one month after the completion of the dredging of the waterway through the bridge to full project cross section by the Government, substitute pile trestles for the present abutments, so as to give a length of bridge over all of 143 feet, including the draw; shall extend the fenders as shown on the plan attached hereto, so that the width between the ends of the fenders shall be 120 feet; and shall sheath these fenders to one foot below low water; all to the satisfaction of the United States District Engineer in charge of the locality.

The Government thereafter dredged the canal at the bridge site to the standard dimensions and the railroad company extended the fender system to accommodate the new dimensions and also installed timber trestles at the approaches to take the place of abutments. The fair cost to the Norfolk Southern of installing the trestles and extending the fender system was $4,891.69, and this work was completed in September of 1924.

In response to further request the time for completion of the bridge itself was eventually extended to November 1, 1928.

9. The Norfolk Southern submitted plans to the Government engineers of a new bridge and fender system to take the place of the existing ones. The planned bridge had a Scherzer rolling lift span with deck plate steel girder approaches on concrete abutments and gave an increased clearance of 80 feet required by defendant's engineers. The new bridge was designed for Cooper's E–50 loading, representing a load of 5,000 pounds per linear foot, an increase over the capacity of the bridge replaced. The substitution was com-

pleted by the Norfolk Southern November 7, 1928, at a fair cost to the company of $113,617.75 computed as follows:

Cost of constructing new bridge and fenders		$108,649.49
Cost of retired structure	$6,957.68	
Less salvage	250.00	
	5,218.26	
Less salvage	250.00	
		4,968.26
Total cost		113,617.75

10. It was the policy of the Norfolk Southern whenever they built a new bridge, to construct one for Cooper's E–50 loading. Had they replaced the old bridge with one of a swinging type, instead of Scherzer rolling lift type, and used concrete abutments and steel girder approach spans, with the old clearance, 46 feet 3 inches and fender system, but with a draw for E–50 loading, the fair cost of such replacement would have been $26,995.37. This sum, $26,995.37, represents direct and special benefits which have accrued or will accrue to the owner of the new bridge by reason of substituting the new bridge for the old.

It was impractical to use a swinging type of bridge, as theretofore, with a clearance of 80 feet and the rolling lift type was substituted for that reason.

In 1932 or thereabout the Government reinstated the canal locks, and the canal at plaintiff's drawbridge is now landlocked, with comparatively still water.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiffs, as receivers of the Norfolk Southern Railroad Company, bring this suit to recover the costs of tearing down the old bridge and erecting a new bridge over the Albemarle & Chesapeake Canal, an artificial, navigable waterway connecting the southern branch of the Elizabeth River with headwaters of the North Landing River, and with Currituck Sound, in the State of Virginia.

The Norfolk Southern Railroad at all times hereinafter mentioned was the owner of the right-of-way of 75 feet in

width over which the canal passed and had constructed a bridge and fender system across the waters of the Albemarle & Chesapeake Canal with a draw of 46 feet 3 inches in the clear and continuously possessed, used, and occupied said right-of-way in conducting its business of a common carrier of passengers and freight over said line of railroad.

On March 19, 1913, the United States purchased the Albemarle & Chesapeake Canal cut and right-of-way as authorized by the River and Harbor Appropriation Act of July 25, 1912, 37 Stat. 201, 206. When the purchase was made the canal had locks at Great Bridge, between the railroad bridge and Elizabeth River, which controlled the flow of the tidal waters. After the purchase by the Government of the canal these locks were removed, and, as a result of the removal of these locks, the canal under the railroad bridge became a tidewater canal.

The purchase of the canal by the Government was a part of the development of an intracoastal waterway from Boston, Massachusetts, to the Rio Grande River, Texas. The canal then had a width of 50 feet and a depth of 8 feet. The Government, in the course of development of the inland waterway, deepened the canal to 12 feet and extended its width to 90 feet. The width of the canal at the bridge remained the same as formerly. As a result a raceway was created between the fenders of the bridge which was hazardous and dangerous for vessels going through the draw of the bridge.

In 1921 the Government ordered, after hearing, the Norfolk Southern Railroad to either remove this bridge and fenders or alter it so as to provide a draw opening between the fenders of at least 80 feet. This order was based on the authority given the Secretary of War under section 18 of the act of Congress approved March 3, 1899, 30 Stat. 1121, 1153, 1154.

The time given within which to remove the old bridge or make the alterations was one year from the date of notice. Extensions were granted from time to time by the Secretary of War. The Norfolk Southern Railroad complied with the order by the destruction of the old bridge and the erection of a new bridge according to the plans mutually agreed upon

by the engineers of both parties. The bridge was completed in November 1928 at a cost to the railroad company of $113,617.75.

It is well-settled law that, under the clause of the Constitution to regulate commerce, Congress has the power to free navigation from unreasonable obstructions by compelling the removal of bridges which do so obstruct free navigation. Requiring the removal or alteration of unreasonable obstructions is not taking private property for public use within the meaning of the Constitution.

In *Union Bridge Company* v. *United States*, 204 U. S. 364, 401, the court held:

> * * * In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made.

See *Monongahela Bridge* v. *United States*, 216 U. S. 177; *Hannibal Bridge Company* v. *United States*, 221 U. S. 194; and *Louisville Bridge Company* v. *United States*, 242 U. S. 409.

Therefore the order of removal of the old bridge and the election of the railroad to erect a new bridge in accordance with the plans of the War Department did not require compensation to be paid to the railroad and was within the powers delegated to the Secretary of War by the provisions of section 18 of the Act of 1899, *supra*.

In *Union Bridge Company*, *supra*, at page 403 the court also stated:

> Some stress was laid in argument upon the fact that compliance with the order of the Secretary of War will compel the Bridge Company to make a very large expenditure in money. But that consideration cannot affect the decision of the questions of constitutional law in-

> volved. It is one to be addressed to the legislative branch of the Government. It is for Congress to determine whether, under the circumstances of a particular case, justice requires that compensation be made to a person or corporation incidentally suffering from the exercise by the National Government of its constitutional powers.

However, in 1936 Congress passed "A bill for the Relief of the Norfolk Southern Railroad Company" which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States, *notwithstanding limitations upon the jurisdiction and power of such court, to hear, determine, and render judgment* upon the claim of the Norfolk Southern Railroad Company against the United States, arising out of or incident to the removal of an old bridge and the construction of a new drawbridge and fender system over the Albemarle and Chesapeake Canal, now the Virginia cut of the Inland Waterway, near Great Bridge, Virginia, to comply with orders of the War Department [49 Stat. 2217]. [Italics supplied.]

It is contended by the defendant that the above bill "simply provided a forum to which the plaintiffs might resort to have their cause of action determined 'according to applicable legal principles' which require a dismissal of the petition." The contention is made that the court cannot render judgment for the cost of the removal of the old bridge and the construction of the new drawbridge and fender system because the cases above cited held that the Government is immune from liability.

The answer to this is found in the hearings before the Committees of the Congress and is set forth in the reports of the Congressional Committees on the bill. At that time all the cases construing the powers granted the Secretary of War under the Act of March 3, 1899, were before the Committee and also the letter from the Secretary of War opposing the passage of the bill and the assertion that the plaintiff had no legal or equitable rights. Nevertheless the report of the Com-

mittee on Claims of the House of Representatives, Report No. 234, 74th Congress, 1st Session, sets forth a full history of the case with all the facts and under Article 6 of the report the Committee stated:

> 6. That the requirement of Norfolk Southern Railroad Co. to comply with said order, and the taking of its property in widening said canal, was unmoral, inequitable, and unjust, and Norfolk Southern Railroad Co. has a moral, legal, and equitable claim against the United States of America for the expense to which it was put in complying with said order of the War Department.

When the bill reached the Senate, the Senate Committee on Claims adopted the House Report as a part of its report, No. 1492, 74th Congress, 2d Session, stating:

> The facts are fully set forth in House Report No. 234, Seventy-fourth Congress, first session, which is appended hereto and made a part of this report.

It is clear from the above that the intention of Congress was to create a liability where heretofore there was no liability.

In this case to hold otherwise would render the act meaningless and absurd. All the facts were before the Congress as well as the Supreme Court cases. Congress was fully aware that under the existing law the Government was immune from liability to the plaintiff.

It is our view that the jurisdictional act gave a cause of action to the railroad company for which the Government is made liable, and which liability did not exist before the passage of the special act.

It is evident from the subsequent actions of the Congress that the policy of nonremuneration to the owners of bridges, which had to be enlarged, lengthened, removed, or replaced, was to undergo a change and that in the future compensation should be allowed when the owners of bridges over navigable waters were compelled to make alterations under orders of the War Department.

Our construction of the special act is strengthened and confirmed by the subsequent act of the Congress. A change in plan and a different policy was made. When an obstruc-

tion to a navigable stream was ordered to be altered or removed by the Secretary of War compensation was allowable.

In 1939 Congress passed a general bill apportioning the expense between the owner and the Government. This bill was vetoed by the President. In 1940 a similar bill was passed by the Congress and was vetoed by the President. The Congress passed the bill over the veto of the President and the bill is now a law of the land [54 Stat. 497].

This legislation shows the purpose of Congress and sheds light on the doubtful parts of the special act in helping to interpret what Congress really meant. The law is clear and well settled that—

> When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. *Cope* v. *Cope*, 137 U. S. 682; *United States* v. *Freeman*, 3 How. 556. [*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309.]

Construction of the new bridge with fender system and the destruction of the old bridge, less its salvage value, entailed a cost to the Norfolk Southern Railroad Company in the sum of $113,617.75. From this amount must be deducted the direct or special benefits which have accrued or will accrue to the owner of the new bridge by the substitution of a new bridge for the old one. By a stipulation of the parties this amount is $26,995.37.

The plaintiff is not entitled to recover the cost of installing the trestles and extending the fender system in 1924. This was work of a temporary nature during the extensions of the time asked for by the plaintiff. It was no part of the permanent structure required and afterwards erected.

Plaintiff is entitled to a judgment in the sum of $86,622.38.

It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and LITTLETON, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

Upon defendant's motion for new trial, which was denied June 29, 1942, the following opinion was filed:

MADDEN, *Judge*, concurring in the result:

The defendant seeks a new trial because the court held that the act conferring jurisdiction upon the court imposed a legal liability upon the Government, although there had been no such liability before the passage of the act, and left nothing for the court to do but determine the amount of plaintiff's damage. The defendant urges that the language of the act and its legislative history show that Congress did not intend to create a new and special liability for the benefit of this plaintiff, but only to waive the statute of limitations and the immunity from suit which the Government would otherwise have had because its act was a tort, rather than a breach of contract, thus falling outside the ordinary jurisdiction of this court; that it required the court to hear and determine plaintiff's claim upon its legal merits under existing applicable legal doctrines, and to deny plaintiff all recovery regardless of the amount of plaintiff's damage if its claim did not have legal merit.

Upon reconsideration, I agree with the defendant's contention as to the meaning of the jurisdictional act. The language of that act, which is quoted in full in the opinion of the court, contains no suggestion that the court should not examine the legal merits of plaintiff's claim. It confers jurisdiction "to hear, determine and render judgment." Language having no significant difference from this is commonly used in such special acts even though Congress intends only to provide a forum for the adjudication of a claim on its merits. See, for example, *United States* v. *Mille Lac Band of Chippewa*, 229 U. S. 498; *Randall* v. *United States*, 71 C. Cls. 152; *Stanton & Jones* v. *United States*, 68 C. Cls. 379. The title, "An Act for the Relief of the Norfolk Southern Railroad Company," is satisfied by the waiver of the statute of limitations, which would otherwise have been an absolute bar to recovery, and the waiver of possible sovereign immunity because of the nature of the Government's alleged wrong. That is the title commonly used by Congress for acts conferring jurisdiction on this court to hear the merits of claims barred by the statute

of limitations or for some other reason outside the regular jurisdiction of the court. See the cases cited *supra*.

I find nothing in the legislative history of the act to contradict the usual meaning of its language. The controversy between plaintiff and the War Department as to whether plaintiff should be compensated for building the new bridge came to the attention of Congress shortly after the completion of the bridge in 1928. In 1929 Congressman Lankford and Senator Swanson introduced identical bills in the two Houses of Congress making direct appropriations to plaintiff of $103,419.23 to reimburse plaintiff for its expenditure for the bridge. These bills were referred to the respective Committees on Claims. Neither bill was reported out. The same thing occurred in 1931.

In January 1934 Congressman Darden and Senator Byrd introduced bills identical in language with those referred to above. On June 1, 1934, the House Committee on Claims reported its bill to the House and recommended its passage, with amendments not material here. The Committee report quoted letters from plaintiff supporting the legal merits of plaintiff's claim and from the War Department denying those merits. The House took no action on the bill. On January 10, 1935, Congressman Darden introduced a bill identical with the 1934 bill as amended by the Committee, making an appropriation to compensate plaintiff. Eleven days later he introduced another bill conferring jurisdiction on this court to "hear, consider and render judgment" on plaintiff's claim. On January 28, 1935, Senator Byrd introduced in the Senate a bill identical with the latter of Congressman Darden's bills, i. e., the bill conferring jurisdiction on this court.

On February 25, 1935, the House Committee on Claims reported out Congressman Darden's appropriation bill. The Report was identical with that of the preceding year. When the bill came up in the House there were two objections which caused the bill to be recommitted to the Committee on Claims. This recommitted appropriation bill then was amended by the Committee by striking out the whole bill except its title and number and substituting for it, with unimportant amendments, the entire jurisdictional bill which

had been introduced, as we have seen, by Congressman Darden, on January 21. The bill was thereupon incorporated into the First Omnibus Claims Bill and reported to the House May 14, 1935.

The Committee's report to the House said:

> The committee had heretofore considered and reported this claim. In this Congress H. R. 3709 was reported carrying an appropriation of $103,419.23, which was the bill objected to. While your committee is definitely of the opinion that the claim has merit, the author of the bill now prefers that the claim be adjudicated by the Court of Claims, and we can see no objection to that procedure. While the former report is based on the appropriation bill, the facts are fully set out therein which give rise to this claim. At the end of said report, an opinion from the War Department on the present form of the bill is included.

As is indicated in the quoted language, the Committee incorporated in its report its former report on the appropriation bill, with the addition of a new communication from the War Department recommending against the passage of the bill. In 1936 this bill was passed and approved by the President.

The legislative history above recited seems to me to show that plaintiff, having grown weary of the repeated and unsuccessful efforts to obtain a direct appropriation, elected to take what it could get, its day in court on the merits of its claim. It had, from the beginning insisted on the legal merits of its claims in the face of the constant denial of those merits by the War Department. In the several Committee reports, the Committee said flatly that it agreed with plaintiff and not with the War Department as to plaintiff's legal rights. It said in each of the reports:

> 6. That the requirement of Norfolk Southern Railroad Co. to comply with said order, and the taking of its property in widening said canal, was unmoral, inequitable, and unjust, and Norfolk Southern Railroad Co. has a moral, legal, and equitable claim against the United States of America for the expense to which it was put in complying with said order of the War Department.

We seem, then, to have a situation where the Congress was not willing to make a direct appropriation by special act, but was willing that plaintiff should have its day in court. It passed an Act in language appropriate to express the latter intent. I think we should not interpret that Act to mean that Congress did substantially what it had repeatedly refused to do, approve payment to plaintiff leaving to the court only the amount of the payment. There is no evidence that the question of the amount, the only question left to this court according the Court's opinion, was the question which troubled Congress. All the indications are that the question of whether plaintiff's claim had legal merit, whether plaintiff or the War Department was right in the controversy pending for years before the Committee, was the question which Congress desired us to "hear, determine and render judgment" upon. Yet the Court holds that it cannot consider that question. I think we should consider it.

I concur in the result reached in the Court's decision because I think plaintiff's claim is a good legal claim. I use the term plaintiff in this opinion to designate the receivers or the Railroad whose receivers they are. Before the Government acquired the Canal, plaintiff owned a 75-foot wide right-of-way for its railroad across a canal 50 feet wide, the canal being located inside the boundaries of a wider strip owned by the Canal Company. As appears in the opinion of the Court, the Canal Company was there first, and the predecessor of plaintiff acquired by condemnation a 40-foot strip crossing the Canal Company's land and canal, and the right to erect a drawbridge over the canal. Plaintiff later, in 1890, by deed from the Canal Company acquired 35 feet of additional width for its crossing of the canal and its approaches thereto. The deed for the 35-foot strip seems to have been an outright conveyance of the title to the land so long as it should be used for railroad purposes. In 1891, plaintiff built a new drawbridge on the 35-foot strip, the canal being then about 50 feet wide. This bridge is the one which, in 1921, the defendant required plaintiff to remove and replace.

In 1913, the United States acquired by purchase from the Canal Company its cut and right-of-way.

It is not entirely clear just what the technical titles of the various parties were. Probably the Canal Company originally owned its land in fee simple, and the Railroad Company when it acquired the right to cross the canal, obtained the fee simple to its strip of land determinable upon its ceasing to use the land for a railroad. See *Tuckahoe Canal Co.* v. *Tuckahoe R. Co.*, 11 Leigh (Va.) 43. If so, the railroad's possessory right was subject to the easement of the Canal Company to continue to maintain the canal as it then existed. If that was what the Canal Company had, that is all the United States obtained by purchase from it in 1913. The assertion of the Secretary of War that the Government, in widening the canal, was only "dredging away its own land" (see Record, p. 61), was not correct, if this was the state of the title. On the other hand, the Government was dredging away plaintiff's land, and thereby creating an additional artificial channel which, in turn, caused plaintiff's bridge and abutments to be an obstruction to navigation in the widened channel. For the cost of the changes made necessary by this taking of plaintiff's land, plaintiff should have been compensated.

If the title was not as above supposed, it must have been that plaintiff railroad acquired, not the fee simple in possession of its strip across the canal land, but an easement of way to maintain a railroad and bridge. If so, I think it does not affect the result. Its easement, unqualified when it was acquired, was a right to maintain a bridge across the canal as the canal then was. It could not have been contemplated that without mention of any such reserved right in its conveyance to the railroad, the Canal Company could widen its canal whenever it pleased, even though it destroyed the railroad's facilities or rendered them unusable. The railroad acquired a fixed and definite, even if incorporeal, property right, which the Canal Company could not destroy or damage with impunity. The United States, which in 1913 stepped into the shoes of the Canal Company, had no greater right. On this assumption as to the title, the statement of the Secretary of War quoted above that the Government was only

"dredging away its own land" would in a sense be true, but would be immaterial. It would be as if one, having granted an easement to another for a way for heavy trucks across his land, should by undermining the way make it unusable. His statement that he was only digging "his own" soil would be beside the point. The important thing would be that he was destroying another man's property, his easement.

The doctrine enunciated by the Supreme Court in the *Monongahela Bridge* case and the other cases cited in the opinion of the Court does not, I think, apply here. They hold, as I understand them, that one who builds his bridge or other structure where it interferes with the navigation of a navigable stream as it then exists, or as it may be improved by changes made within the scope of the existing public easement, may be required to remove the interfering structure without compensation. But where the Government desires to use additional land for the purpose of furthering navigation, it cannot require the owner of that land to donate the land, nor to destroy the existing structures on it, in order to make navigation possible where there was neither navigation nor the right to navigate before. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 599; *United States* v. *Cress*, 243 U. S. 316, 321 ff.; *United States* v. *Chicago, B. & Q. R. Co.*, (C. C. A. 8th) 82 F. (2d) 131, 106 A. L. R. 942, cert. denied 298 U. S. 689; *Delaware R. Co.* v. *Weeks*, (D. C. Dela.) 293 Fed. 114, 119, 121.

The notice given plaintiff in 1921 by the Secretary of War did not say, nor could it properly have said, that plaintiff's drawbridge was an interference with navigation of the canal at its then width. It said rather that the "alteration * * * is required to render navigation through or under said bridge, *upon completion of the aforesaid project of improvement*, reasonably free, easy and unobstructed * * *." [Italics supplied.]

My conclusion is, therefore, that the Government, in order to obtain the navigable channel which it desired, found it necessary to destroy or compel the alteration of plaintiff's bridge which plaintiff was rightfully maintaining, and that the Government was under a duty to compensate plaintiff.

GREAT LAKES CONSTRUCTION CO., A CORPORATION, v. THE UNITED STATES

[No. 43449. Decided April 6, 1942]

On the Proofs

Government contract; unwarranted interference and delays by defendant.—Where plaintiff, contractor, entered into a contract with the Government on March 16, 1932, for the construction of a Federal building at Detroit, Mich., and where it is established by the evidence that through the unwarranted interferences and delays by the Government the contractor was interrupted in the orderly performance of the work and in following the progress schedule; it is *held* that plaintiff is entitled to recover.

Same; allowances for changes.—Where the contract for the construction of a Federal building provided for changes; it is *held* that such provision must be interpreted as meaning reasonable changes, for which allowances were to be made accordingly in time and money.

Same; insufficient proof.—Where claim is made by plaintiff for its subcontractor for delays caused by defendant and where it is established that such delays occurred; it is *held* that the proof submitted is insufficient to estimate the amount of damages and plaintiff is accordingly not entitled to recover.

Same; Economy Act of 1932.—Where the contract in the instant case was entered into March 16, 1932, and the authorization act was approved July 3, 1930 (46 Stat. 860, 896); it is *held* that under the Economy Act of June 30, 1932 (47 Stat. 382, 412) delays by the Government which were unnecessary and unreasonable are not to be excused by the provisions of said act, which stipulated that reductions were to be made in the cost of construction of public buildings for which no contract had been made at the time of the enactment of said Economy Act.

Same.—The Economy Act must be read in the light of reasonability and not arbitrariness nor neglect.

The Reporter's statement of the case:

M. T. I. McKnight for the plaintiff. *Sims, Handy & McKnight* were on the briefs.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant. *Mr. J. Robert Anderson* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff, Great Lakes Construction Company, is a domestic corporation of the State of Illinois.

2. March 16, 1932, plaintiff and defendant entered into a written contract whereby, for a consideration of $3,127,213, the plaintiff undertook to furnish all labor and materials, and perform all work required for the construction (except foundations and elevators) of the Post Office, Court House and Custom House at Detroit, Michigan, including sidewalks and curbs about the building, in accordance with specifications, schedules, and drawings, enumerated, the work to be completed within 600 calendar days after the date of receipt of notice to proceed.

The agreed notice to proceed was received, April 5, 1932, thus fixing the time for completion on or before November 26, 1933.

Copy of the contract and specifications is filed in evidence and made part hereof by reference.

3. For delays beyond the control of the contractor the defendant extended the time for performance 193 days, or to and including June 7, 1934, at or about which time the plaintiff completed its work. No liquidated damages for delay have been assessed. The Government assumed control of the building and began operating it April 23, 1934.

4. On June 7, 1932, the plaintiff requested of the Supervising Architect, Treasury Department, information as to when the models for the building would be ready, repeating this request June 23, 1932, and June 27, 1932. On July 1, 1932, receiving no satisfactory response, the plaintiff wired the Government's local architect at Detroit, hereinafter referred to as the "architect," who by contract was authorized by the Government to prepare all drawings, specifications, details, pass on all shop drawings, approve or reject architectural samples listed in the specifications and criticize and approve all ornamental work and colors and finishes, complaining of delay in receipt of models, particularly the models for carving stone belt course above the granite base, and for bronbe windows.

The architect replied by wire July 5, 1932, that no models would be available until some time after bids were received July 18, 1932.

July 16, 1932, the plaintiff requested of the supervising architect an extension of time for delay due to nonreceipt of models and July 20, 1932, the supervising architect replied that the request would be considered when the extent of delay was ascertained.

The limestone course, for which models were necessary, was immediately on top of a black granite base course, except within the court. The plaintiff had planned to begin setting this limestone course in August of 1932.

Plaintiff's subcontractor received the models for the limestone course about the first of October 1932, whereupon the limestone was carved and plaintiff began setting the limestone course the latter part of October 1932.

Models for the bronze windows were furnished concurrently with the models for the limestone course.

There were delays in furnishing other models, the definite result of which does not appear.

As a consequence of the delay in furnishing models much of the work intended to be done in summer and autumn was done in winter when, due to the severity of the weather, work at times had to be suspended.

5. The contract plans showed connection of the building to an old sewer system. The plaintiff's subcontractor for the sewer system of the building was notified by the City of Detroit that the connection as planned would not be permitted, that the sewer from the building would have to be connected with a new sewer line nearby. The plaintiff notified the Government as to this situation and June 10, 1932, submitted to the Supervising Architect a proposal for effecting the change in the sum of $1,505.00. Other changes in the sewer system were thereafter considered by the Government. On August 30, 1932, the contracting officer accepted plaintiff's proposal for connection to the new sewer and lowering outfall, which had been modified by a proposal dated July 6, 1932, for combined connection and outfall in the sum of $9,125.00. Before the proposal was accepted plaintiff demanded an extension of time for per-

formance, and on September 1, 1932, was requested by the Supervising Architect to inform him, upon completion, the number of days of delay due to the extra work.

6. The building consisted of ten stories, with four stairways from basement to top.

As early as May of 1932 the architect was considering the question of increasing the thickness of metal in these stairways. July 18, 1932, he requested of plaintiff a proposal for work involved in changing the first sentence of paragraph 276 (D), page 99 of the specifications to read:

> Risers and treads shall be formed of one piece of steel, No. 10 gauge, for Stairs Nos. 1, 3, 7, and 10, and No. 14 gauge for other stairs, and shall be secured to the seat angles by means of two bolts each side.

The plaintiff submitted a proposal to the construction engineer July 29, 1932, to effect this change at an additional price of $1,376.00.

August 4, 1932, plaintiff requested of the Supervising Architect that consideration of this proposal be expedited, claiming that postponement of the changed work would involve extra cost.

There followed a dispute over a question of duplication of changes and October 14, 1932, the construction engineer notified plaintiff that the proposal of July 29, 1932, was finally rejected and another change, initiated May 11, 1932, was adopted and proposal therein accepted.

Plaintiff was put to extra cost and labor in effecting the change at the time it was ordered due to the fact that stairs were to be tied in to the structural steel and should have been built concurrently with erection of the structural steel or shortly thereafter, but could not be so built due to delay in deciding upon the changes. Fireproofing also could not be installed in due order over the structural steel joining the stairways until the question of stairway material was decided, and the delay in arriving at this decision entailed extra cost, time, and labor in fireproofing.

7. On November 10, 1932, the construction engineer requested of the plaintiff a proposal for raising the first floor over the high tension and transformer rooms in the basement

by some three and one-half feet of concrete as a protection for the high tension lines.

Plaintiff submitted a proposal November 18, 1932, in the sum of $3,569.00 and seven days' extension of time. The proposal was revised January 18, 1933, at the request of the defendant, and as revised, with an allowance of seven additional days for performance, was accepted by the defendant March 18, 1933, in the sum of $2,912.11.

8. When plaintiff was ready to install plumbing pipes for a toilet room on the second floor, it was discovered there was not room enough for the stacks to go into the floor without protruding through into the ornamental ceiling of the first floor. This situation was due to a mistake on the part of the architect.

This discovery plaintiff promptly brought to the attention of the construction engineer, October 28, 1932, and asked for a decision as to what was to be done. Defendant's officers considered the difficulty for some time, finally worked out a scheme for concealing the plumbing, and March 10, 1933, asked the plaintiff for a proposal covering the adopted change.

The plaintiff submitted a proposal March 23, 1933, in the sum of $11,253.00, with extension of contract time 35 days. The proposal not having been passed upon, the plaintiff, May 18, 1933, protested to the construction engineer over the delay, stating that the cost of executing the change was increasing, due to progress on other work.

The change was given further study by defendant's officers and a revised change was submitted to the plaintiff with a request for proposal, which was promptly given by the plaintiff November 14 and 20, 1933, in alternatives, one of which was accepted December 20, 1933, with extension of the requested time.

9. The office of the Supervising Architect on January 4, 1933, requested of the plaintiff a proposal for a detailed change in partitions on the sixth, seventh, and eighth floors. The requested proposal was submitted January 19, 1933. On the 2nd day of February 1933, the plaintiff notified the construction engineer that unless the proposal was accepted

by the 10th of the month, extension of contract time would be necessary.

The proposal as to the sixth and seventh floors was rejected March 27, 1933, by the Supervising Architect. On May 18, 1933, the plaintiff complained to the construction engineer that the price quoted for the eighth floor would not, due to the delay, cover the cost of the change.

On January 23, 1934, the office of the Supervising Architect notified plaintiff by radiogram that the proposal for the eighth floor was rejected. The partitions affected on the eighth floor subdivided the future offices of the U. S. District Attorney.

10. On February 7, 1933, the construction engineer requested of the plaintiff its proposal covering a change in nine rooms on the sixth floor to be occupied by the Organized Reserves and Recruiting Service. This proposal was submitted February 13, 1933, and rejected April 15, 1933, on the ground that it was excessive in price and request was made for a revised proposal. Another proposal was submitted April 24, 1933, and rejected May 25, 1933.

11. In response to a request on or about March 6, 1933, the plaintiff furnished a proposal to the construction engineer March 13, 1933, for the installation of direct radiation in certain toilet rooms on the seventh and eighth floors, not called for by the plans. After consideration the proposal was rejected May 3, 1933.

12. March 10, 1933, the construction engineer requested of plaintiff proposal for a change in the cafeteria located on the tenth floor. The plaintiff submitted the proposal April 8, 1933. The proposal was rejected June 21, 1933. At the time the proposal was rejected the necessary layout of the cafeteria had not been furnished the plaintiff and the plaintiff, notwithstanding rejection of the proposal, was still unable to proceed with the cafeteria and other work involved therewith. The plaintiff protested this situation September 7, 1933. The information necessary for plaintiff to complete the cafeteria was not furnished until the latter part of October or the first part of November 1933.

13. The defendant contemplated certain changes on the tenth floor in quarters to be occupied by the Weather Bu-

reau, and in letter to the plaintiff April 14, 1933, the construction engineer requested a proposal for the work involved in making the changes, which the plaintiff submitted April 26, 1933. The proposal was accepted August 8, 1933.

14. On May 11, 1933, the office of the Supervising Architect ordered plaintiff to stop work on space that had been allotted to the Customs Service and Food and Drug Administration on the fourth floor, until definite assignment of the space was made.

On December 8, 1933, the construction engineer withdrew the stop order and instructed plaintiff to proceed with the work involved in accordance with the original contract. December 15, 1933, the plaintiff advised the construction engineer that additional costs were incurred by reason of the stoppage of work, which would be billed against the Government at the completion of the work. The construction engineer thereupon, December 16, 1933, ordered all work in the space involved on the fourth floor to be stopped. January 12, 1934, the construction engineer authorized the plaintiff to proceed with certain changes. On January 18, 1934, the construction engineer directed plaintiff to proceed on this work according to the original plans.

15. A part of plaintiff's contract work was the construction of a connecting tunnel to the Federal Reserve Bank Building across the street. The concrete foundation of the building had been laid by another contractor and in excavating for the tunnel the plaintiff encountered concrete left by the other contractor unnecessarily extending into the tunnel area. The excess concrete had to be removed and plaintiff submitted to the Supervising Architect a proposal June 15, 1932, for its removal. On August 4, 1932, the plaintiff in letter to the Supervising Architect claimed it was entitled to an extension of time, to be later determined, covering delay in disposition of the proposal. The Secretary of the Treasury accepted the proposal of June 15, 1932, on October 8, 1932, without mention of extension of time for performance. On October 12, 1932, the plaintiff submitted to the construction engineer claim for extension of 67 days covering delay in approval of the proposal for

removal of the excess concrete and in approval of change in an incinerator, the facts in regard to which are found hereinafter. No separation of the 67-day period was made as between the two causes of delay.

16. On July 11, 1932, the construction engineer requested of plaintiff a proposal for changing the dimensions of the pit for platform scales in the basement from 6 feet 5 inches by 4 feet 7 inches to 6 feet by 5 feet. The proposal was submitted July 13, 1932, and accepted August 15, 1932. No delay affecting other work or completion of the contract appears to be involved in this transaction.

17. In letter to the plaintiff July 25, 1932, the construction engineer requested a proposal for an incinerator on the mezzanine floor in the seventh story. On August 4 and again on August 11, 1932, the plaintiff asked the construction engineer for additional copies of drawings for the incinerator in order that all subcontractors affected by the installation of an incinerator might properly modify the details of their work. The proposal was submitted August 24, 1932, the plaintiff reiterating complaint of delay due to paucity of drawings. The proposal was accepted October 8, 1932. On November 12, 1932, the plaintiff informed the construction engineer that it was its opinion, on investigation of the only type of incinerator that would comply with the specifications, that the incinerator would not fulfill the needs of the service, and suggested that he consider this situation. On January 11, 1933, the construction engineer replied informing the plaintiff that the incinerator specified would be satisfactory and that plaintiff should proceed with its installation.

18. On or about October 28, 1932, the plaintiff submitted to the Supervising Architect samples of hardware, consisting of door knobs, locks, butts, letter-hole plates, etc., for approval. The Supervising Architect transmitted them to the architect November 9, 1932, instructing the plaintiff thereafter to submit such samples through the architect. The samples were passed upon by the architect November 15, 1932, as to construction, and some of them rejected, the plaintiff being notified by the architect of the result of his inspection. In response to a criticism by plaintiff as to

procedure in submission the Supervising Architect notified plaintiff November 16, 1932, that submission through the architect was for recommendation as to finish.

Door frames could not be shipped to the job before the hardware was approved, size, dimensions, shape of the hardware being necessary to the final fabrication of the door frames, and of the doors themselves,

There followed correspondence between the parties as to the division of duties of inspection and approval between the architect and the Supervising Architect, and this conflict not having been resolved by December 19, 1932, and the samples authoritatively passed upon, the plaintiff claimed of the Supervising Architect extension of contract time appropriate to the extent of delay in final disposition of the matter.

Some of the samples were approved by the Supervising Architect and others rejected, December 28, 1932. Among those rejected were certain locks, knobs, and escutcheons because they were not of bronze. Again on January 9, 1933, certain samples were rejected because black finish was applied to wrought iron and not to bronze. Letter slots were also rejected on account of style.

Thereafter the parties corresponded frequently over the question of finish and metal, it developing that black finish desired could not be applied to bronze. The matter was not finally disposed of until May 4, 1933, when the Supervising Architect rescinded the rejection of January 9, 1933, approving a rustproof black finish, which required wrought iron.

19. On October 7, 1932, the construction engineer requested of the plaintiff a proposal for change in lookout gallery telephone and associated signal equipment, located in the basement and first and second floors, for use of inspectors. For this change the plaintiff submitted its proposal November 8, 1932. On February 4, 1933, the proposal not having been acted upon, the plaintiff advised the Supervising Architect that it was claiming extension of time and damages because of the delay, subject to future computation. Plaintiff submitted a revised proposal on or about April 28,

1933, at a lower price, which was accepted by the Assistant Secretary of the Treasury July 10, 1933.

20. On October 31, 1932, the construction engineer requested of the plaintiff a proposal for extending a live-steam connection and an ice-water connection, to the prospective laboratory of the Bureau of Industrial Alcohol on the tenth floor, and the proposal was submitted November 29, 1932. The proposal not having been disposed of, the plaintiff on February 4, 1933, notified the Supervising Architect that it demanded an extension of time for the delay, with consequent damages, to be computed at a later time. On the 15th of February 1933 the Assistant Secretary of the Treasury accepted the proposal of November 29, 1932, expressly excepting any extension of time.

21. On January 23, 1933, the construction engineer requested of plaintiff a proposal for changes in the counter desks in the office of the clerk of the court in two rooms on the seventh floor. The changes desired were not extensive and no additional drawings were prepared. The amount of the change agreed to was $276.00. There is no proof of delay by the defendant in connection with the change.

22. January 25, 1933, the construction engineer requested of the plaintiff a proposal "in the nature of a deduction from both enclosure and fixtures" from a toilet room on the second floor. Plaintiff's offer of a credit of $22.00 was rejected March 23, 1933, and the construction engineer ordered plaintiff to proceed under the original specifications.

23. The contract specifications called for the use of pencil rod stiffener in certain ceilings, for the retention of plaster. The plaintiff suggested a change to runner channels with a view to giving the plasterers a solid surface to work against instead of a springy surface, thus assuring more even work and security against dropping off of the mortar, the pencil rods having a tendency to sag. For the change the plaintiff, some time before February 13, 1933, offered a credit of $500.00. March 10, 1933, the construction engineer requested a revised proposal, based on different channels than those suggested by the plaintiff. The plaintiff submitted a revised proposal March 15, 1933, at an addition to the

contract price of $242.00. The revised proposal was accepted April 12, 1933.

There is no satisfactory proof of delay in connection with this change affecting completion of the contract, or otherwise to the damage of plaintiff.

24. On March 2, 1933, the construction engineer requested of the plaintiff a proposal for change of location of the office of the building's chief engineer in the basement. The proposal was submitted March 13, 1933, and accepted June 24, 1933. Proof is lacking that this item delayed the contractor or extended the time of performance.

25. The construction engineer, March 3, 1933, requested of the plaintiff a proposal for adding a catwalk in the boiler room. The proposal was rejected May 3, 1933.

26. On March 17, 1933, the construction engineer asked the plaintiff for a proposal covering a change desired by the Recruiting Service of the War Department in offices to be occupied by it on the sixth floor. The proposal was submitted April 18, 1933, and rejected September 18, 1933, with instructions to install according to the original plans.

27. In the building were water-storage tanks. To prevent leakage to rooms underneath, particularly from condensation, the construction engineer on March 28, 1933, requested of plaintiff a proposal to furnish and install under the tanks a lead drip pan, with bottom and sides coated with a two-inch layer of reinforced concrete. The proposal was submitted April 5, 1933, and accepted August 9, 1933.

28. The construction engineer requested of the plaintiff April 5, 1933, a proposal for substituting steel and glass partition for glazed brick partition of the engineer's workshop in the basement, with other changes of a minor nature. The proposal was submitted April 10, 1933, on a fixed-price basis. On July 27, 1933, the Assistant Secretary, Treasury Department, ordered plaintiff to proceed with this change on another basis, that of cost plus overhead and ten percent profit, not exceeding $701.80.

29. On April 14, 1933, the construction engineer asked plaintiff for a proposal for two additional partitions and doors, converting a cashier's wire cage in the offices of the collector of internal revenue, into three separated wire cages.

The plaintiff made a proposal on or about May 17, 1933, which was accepted June 23, 1933. Delay in accepting the proposal affected no other work, did not delay completion of the contract as a whole and plaintiff was not damaged thereby.

30. On April 23, 1933, the construction engineer requested of the plaintiff a proposal for change in location of the flagpole. As shown in the structural drawings the flagpole was not centered in the building and the relocation was for the purpose of correcting these plans. The proposed change required additional structural beams. The proposal was submitted May 2, 1933, and accepted July 27, 1933.

There is no satisfactory proof that the change resulted in any loss or damage to the plaintiff not compensated for in the accepted proposal.

31. On May 22, 1933, the construction engineer requested of the plaintiff a proposal for change in judge's suite on the eighth floor. The proposal was submitted June 8, 1933. The office of the Supervising Architect July 20, 1933, objected to plaintiff's price as excessive. The plaintiff August 11, 1933, refused to reduce its price, and the proposal was rejected September 25, 1933, and plaintiff instructed to carry out the original requirements.

32. On May 25, 1933, the construction engineer requested of the plaintiff a proposal for a trucking space enclosure, and a mail conveyor from basement to second floor.

The proposal was furnished June 19, 1933, in the amount of $30,495.00. The proposal was rejected October 6, 1933.

Proof is lacking that plaintiff was in any way damaged by reason of the request for this proposal and abandonment of the change.

33. Plaintiff in April of 1933 had been verbally requested to suspend work in toilet room No. 225-A and the area immediately surrounding it, pending a decision as to enlargement. July 26, 1933, the plaintiff requested the construction engineer for a decision in the matter. The construction engineer August 16, 1933, asked the plaintiff for a proposal covering a relocation of the toilet room. The proposal was submitted August 19, 1933, covering this and

other changes. That part of the proposal applicable to toilet room No. 225–A is not disclosed. The proposal was accepted September 25, 1933.

34. The plaintiff entered into a contract with Thomas King Company of Detroit, Mich., July 26, 1932, whereby, for the consideration of $137,000.00, Thomas King Co. agreed to do all lathing and plastering, including all necessary plastering patching, in accordance with paragraphs 443 to 466–B, inclusive, of the specifications herein, to be entirely completed not later than September 30, 1933. It was further agreed in the contract that plaintiff might make any alterations in the work of Thomas King Co. by adding to, omitting from, or deviating from the specifications which the plaintiff should deem proper and the architect advise, without impairing the validity of the contract, and that in all such cases the value of the alterations should be determined and agreed upon in writing. Unit prices for the appropriate additions and deductions were specified.

The subcontractor for lathing and plastering, Thomas King Co., performed the work so agreed upon. Due to authorized changes in its work, to delay caused by the defendant, and to a strike, Thomas King Co. was unable to finish by September 30, 1933, but completed its work on or about March 31, 1934.

There is no satisfactory proof of the amount of damages suffered by Thomas King Co. through delays caused by the defendant not authorized by the prime contract.

On October 3, 1934, the plaintiff in writing agreed to pay Thomas King Co. plaintiff's claim against the defendant in the amount of $10,845.41, in respect to delay in lathing and plastering, when the claim could be collected.

35. On June 5, 1933, the plaintiff served notice on the construction engineer that due to authorized extensions of time on change orders and to extensive delays due to the work being held up for decisions by the Government on changes, the contract could not be completed by the original date set, and that in consequence charges would accrue against the Government for temporary heat for the period of delay during the winter.

In response to this the Supervising Architect June 27, 1933, advised the plaintiff: "Should such additional temporary heat become necessary on account of delays, you are requested to keep an accurate cost record so that a proposal may be submitted through the construction engineer when the total additional cost is determined."

The plaintiff kept a cost record of temporary heat from November 26, 1933, the unextended contract date for completion, to April 23, 1934, the date when the Government began operating the building, and furnished a statement thereof in the amount of $23,796.41 to the Supervising Engineer, Procurement Div. (P. W. Branch), Treasury Department, May 22, 1934. It was treated as a claim and disallowed by the Comptroller General of the United States May 23, 1935, and no part of it has been paid. The administrative office recommended payment in the sum of $22,368.61.

The actual necessary cost to plaintiff of heat for the building beginnning November 27, 1933, and ending April 22, 1934, was $19,061.47.

36. During the progress of the work it was necessary for the plaintiff immediately to cease operations in areas where the defendant requested a proposal for change. In practically all instances where the proposal was finally rejected by the defendant, the rejection was due to a desire on the part of the Government to restrict expenditures of public money, and delay in acceptance of proposals was due largely to a consideration of whether the change was essential.

The contract in suit was entered into March 16, 1932 (Finding 2), the project having been appropriated for by the act of July 3, 1930 (46 Stat. 860, 896), at an estimated cost of $5,650,000.

Section 320 of the act of June 30, 1932 (47 Stat. 382, 412), provided:

> SEC. 320. Authorizations heretofore granted by law for the construction of public buildings and public improvements, whether an appropriation therefor has or has not been made, are hereby amended to provide for a reduction of 10 per centum of the limit of cost as fixed in such authorization, as to projects where no

> contract for the construction has been made. As to such projects where a contract has been made at a cost less than that upon which the authorization was based, such cost shall not, unless authorized by the President, be increased by any changes or additions not essential for the completion of the project as originally planned.

Except in particulars noted, the circumstances hereinbefore set forth severally or conjunctively contributed to the final result of delaying the completion of plaintiff's contract work approximately 200 days beyond the time it would otherwise have been completed.

The period of delay was due to action or inaction on the part of the Government, not authorized or excusable under the terms of the contract, for which the plaintiff was not responsible.

By reason of this delay the plaintiff suffered loss and damage.

37. The amount of loss and damage so suffered by the plaintiff, exclusive of expense for temporary heat, is $37,720.41, comprised of elements as follows:

Insurance (fire, tornado, riot, and commotion)	$4, 080. 54
Job overhead	11, 416. 60
Liability insurance thereon	570. 83
Office overhead	17, 375. 75
Electricity and temporary lighting	1, 242. 39
Equipment rentals	3, 034. 30
Total	37, 720. 41

This total represents the actual cost to plaintiff because of the delays after deducting the amounts and extensions of time allowed by the change orders.

The court decided that the plaintiff was entitled to recover.

WHALEY, Chief Justice, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant on March 16, 1932, for a consideration of $3,127,213, whereby the plaintiff undertook to furnish all labor and materials, and perform all work required for the construction (except foundations and elevators) of the Post Office,

Court House and Custom House at Detroit, Michigan, including sidewalks and curbs about the building, in accordance with specifications, schedules, and drawings, enumerated, the work to be completed within 600 calendar days after the date of the receipt of notice to proceed. Notice to proceed was given the plaintiff on April 5, 1932, which fixed the time of completion on or before November 26, 1933. Defendant assumed control of the building and began operating it on April 23, 1934, although the building was not finally completed until June 7, 1934. The defendant extended the time for completion for 193 days owing to the delays occasioned by the defendant and beyond the control of the contractor. No liquidated damages for delay were assessed against the contractor.

This suit is for damages occasioned plaintiff due to delays caused by the defendant.

The building contemplated under the contract was to occupy an entire square of the city of Detroit and was to be occupied not only by the Post Office but by the Court House, Custom House, and other agencies of the Government. It was to be a ten-story building and have a connecting tunnel to the Federal Reserve Bank Building across the street.

Plaintiff is a competent engineering contracting company, having built many large Government buildings, and we have found from the record that no delays were occasioned by it.

This whole case is a factual one and involves no question of law. The facts, as found by the commissioner, have been adopted by the Court, after a careful perusal of the evidence, which overwhelmingly substantiates the findings of fact made by him. It is apparent that, through the unwarranted interferences and delays by the Government, the contractor was so interrupted in the orderly performance of the work and the following of the progress schedule as laid down by it at the beginning of the work, that approximately 200 days more than the allotted time in the contract for the completion of the work were necessary in order to finally complete the contract.

Although the contract provided for changes under section 3, this section must be interpreted as meaning that they were reasonable changes and that allowances were to be made accordingly, in time and money.

In several instances there were change orders which allowed for an extension of time. These are not claimed and therefore do not enter into our consideration of the case. Under the terms of the contract the defendant had a right to make them.

There were other changes which were necessary because of defects in the plans and specifications occasioned by the neglect of the architect.

There were changes due to the failure of the Government to provide articles which were called for under the contract and to provide models, especially the models for the stone work. This stone work was to be in place at the early part of the contract. It was not finished until many months afterwards, thereby causing the building to be open during the winter months, when it would have been closed had the models been provided in time. This caused the contractor much expense and delay.

The findings show that in 26 different instances severally and conjunctively the plaintiff was delayed and, as a consequence, suffered damages. Many of these delays ran concurrently; some of them were of such a serious nature and required such radical changes that the contractor was ordered to stop work until the changes could be decided on, and in many instances, after long delays, the contractor was told to proceed according to the original plans or according to the corrected plans. This applies to the changes contemplated in the plans of the sixth, seventh, and eighth floors.

The stoppage of work on the sixth, seventh, and eighth floors necessarily retarded and delayed the work on the two floors above the eighth floor. The plumbing on these lower floors had to be connected before the floors above could have the plumbing work installed.

We do not think it necessary to go into each item of delay and damage suffered. The facts, as found, plainly

show the nature of the delays and the extent, as admitted by the defendant in the extension of time granted and the nonimposition of liquidated damages.

During all these delays the plaintiff had to keep its force on the job or shift it from place to place, necessitating loss of time and efficiency.

The entire period of the delays was due to action or inaction on the part of the Government, unauthorized under the terms of the contract, and, therefore, defendant is responsible for the damages suffered by the plaintiff.

It was necessary for the plaintiff to keep fire, tornado, riot, and commotion insurance during the entire period of the extension as well as liability insurance, amounting to $4,080.54 and $570.83, respectively. In addition plaintiff had to expend $11,416.60 for job overhead; $17,375.75 for office overhead; $1,242.39 for electricity and temporary lighting; and $3,034.30 for equipment rentals, making a total of $37,720.41. This amount represents only the cost to plaintiff for delays after taking into consideration and deducting the increased amounts and extensions of time allowed by the change orders. Plaintiff is entitled to recover on these items.

Under the terms of the contract the building was to be completed November 26, 1933, but, owing to the delays occasioned by the defendant, it was not completed until the following summer. It was therefore necessary for the plaintiff to furnish heat for the building from November 26, 1933, until the building was taken over by the Government in April 1934. Plaintiff would not have had to furnish heat for the building during this period, had it not been delayed by the action of the defendant, and, therefore, plaintiff is entitled to recover the cost of heating the building in the sum of $19,061.47.

A further claim is made by plaintiff for its subcontractor for lathing and plastering. There is no question that the subcontractor was delayed by reason of the action of the defendant but there is no way of establishing what the damages were. Plaintiff has attempted to prove this claim by showing the difference between the contract price between

it and the subcontractor and the cost to the subcontractor. This is insufficient and is an unsatisfactory method of proof, and, therefore, has to be denied for failure of proof.

Defendant attempts to excuse the delays occasioned by the Government under the provisions of section 320 of the Economy Act of June 30, 1932 (47 Stat. 382, 412).

The contract in this case was entered into three months before the enactment of the Economy Act and the authorization was made two years before. No changes or additions were made which were not essential for the completion of the project, as originally planned, and there is nothing in the act which provided for unreasonable and unnecessary delays in the consideration of any change.

The act must be read in the light of reasonability and not arbitrariness or neglect. The act has no application in this case.

Plaintiff is entitled to recover the sum of $56,781.88.

It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

ROBERT E. KLOTZ v. THE UNITED STATES

[No. 45432. Decided May 4, 1942]

On Defendant's Motion To Dismiss Amended Petition

Jurisdiction; petition held not to comply with provisions of Title 28, section 250, U. S. Code.—See opinion on defendant's motion to dismiss, 95 C. Cls. 179.

Mr. Robert E. Klotz pro se.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The original petition in this case was filed April 18, 1941.

Defendant filed a motion to dismiss and the court granted the motion and dismissed the petition December 1, 1941, on the ground that the petition was vague and indefinite and did not state a cause of action. (95 C. Cls. 179.)

Plaintiff was allowed to amend his petition. The amended petition was filed January 14, 1942, and on March 7, 1942, defendant filed a motion to dismiss.

The amended petition consists of the elimination of several duplications in the original petition and the addition of a few new sentences, none of which added to the alleged cause of action. The only material addition is the assertion that—

> petitioner has in the past demanded remuneration of the Navy Department under the implied contract of January 31, 1940, above mentioned, and that the Navy Department has not remunerated your petitioner under said contract or otherwise, in any way connected with this claim; [and] that the contract covers information.

Plaintiff filed certified copies of three letters from the Navy Department to substantiate this assertion but, upon examination, these letters fail to corroborate the alleged contract.

The letter of January 31, 1940, is simply a denial of plaintiff's theory of a magnetic-control type of torpedo. The last paragraph reads as follows:

> This Bureau therefore adheres to its previously expressed opinion that the utilization of magnetic devices of the design you describe would constitute too unpromising a project to warrant the expenditure of ordnance funds on it at this time.

Previous to the writing of this letter, other letters were exchanged between plaintiff and defendant. In a letter dated December 2, 1939, defendant informed the plaintiff that—

> This idea has been frequently considered for at least the last 20 years. But the magnetic field of a ship does not appear sufficiently strong to actuate such a mechanism at the ranges which ordinarily would be necessary to insure that a torpedo would change its course so as not to miss a ship.

In this Bureau's opinion, the idea you suggest is not of sufficient value to warrant acceptance as an experimental project at this time.

Later, on August 7, 1940, defendant wrote plaintiff that:

The Bureau has not used, nor does it expect to use, any of the ideas advanced by you. It is not interested in the devices which you have proposed and does not desire to consider them further. Although this Bureau appreciates your interest in the national defense, it does not consider that you have made known to it any new ideas regarding magnetic phenomena, or that in your correspondence you have supplied any suggestions for which this Bureau would be justified in giving you any financial remuneration.

Plaintiff's whole claim is based on correspondence which he claims furnished the Navy Department with information relating to certain methods and magnetic devices which the Navy Department has been able to use in the improvement of magnetic devices other than plaintiff's own.

The letters show no express contract and plaintiff does not claim an express contract. His claim is based on an implied contract.

There is no allegation of fact which constitutes an implied contract in the amended petition nor is there any in the letters furnished by plaintiff.

The letters to plaintiff distinctly and definitely state that the information, through correspondence, which plaintiff has attempted to furnish to the Navy Department, has been known to it for many years and that the Department could not remunerate plaintiff for his suggestions because of their lack of value.

There is no cause of action in the amended petition which would constitute in law an implied contract.

Defendant's motion to dismiss is granted and plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

Reporter's Statement of the Case

EASTERN BUILDING CORPORATION v. THE UNITED STATES

[No. 45222. Decided April 6, 1942]*

On the Proofs

Lease of post office premises; cancellation under the Act of March 3, 1885.—Where plaintiff on March 1, 1922, entered into a lease with the Post Office Department for the use of certain premises, belonging to the plaintiff, for a period of 20 years from October 1, 1921; and where the Department occupied said premises under said lease until in 1939 when it gave notice to plaintiff that defendant elected to cancel said lease in accordance with and pursuant to the provisions of the Act of March 3, 1885, and defendant accordingly surrendered said premises on August 31, 1939; it is *held* that the plaintiff is not entitled to recover.

Same.—Where a lease entered into by the Government for the use of premises by the Post Office Department did not contain an express provision giving the Government the right of cancelation; but where at the time said lease was entered into the Act of March 3, 1885 (providing that a lease of such nature should cease and terminate "whenever a post office can be moved into a Government building") was in effect; it is *held* that this provision of the statute was as much a part of the lease as if it had been written therein and formed a part of the contractual relation of the parties.

Same; retroactive effect of repealing statute.—The repeal of the Act of March 3, 1885, by the Act of June 19, 1922, did not have a retroactive effect and did not take out of a lease entered into prior to such repeal the cancelation provision of the Act of 1885. *United States* v. *Heth*, 3 Cranch 399, 413, and similar cases cited.

Same.—A statute will not be given a retrospective effect unless its terms show such a legislative intent.

Same.—There was a total absence of any expressed retrospective intention in the repealing statute of June 19, 1922. *Twin Cities Properties, Inc.* v. *United States*, 87 C. Cls. 531 and 90 C. Cls. 119, distinguished.

The Reporter's statement of the case:

Mr. Homer S. Cummings for the plaintiff. *Messrs. Raymond E. Hackett*, *Mark W. Norman*, and *Walter B. Lockwood* were on the briefs.

*Plaintiff's petition for writ of certiorari denied by the Supreme Court, October 12, 1942.

Messrs. Winthrop G. Brown, Thomas E. Ervin, and *Bleakley, Platt & Walker* were on the briefs of the Committee for Holders of Eastern Building Corporation Bonds as *amicus curiae*.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Henry Fischer* and *Elihu Schott* were on the briefs.

This case (No. 45222), together with No. 45269, was decided December 1, 1941; it being held that the plaintiff was not entitled to recover and the petition in each case being dismissed. Opinion by Chief Justice Whaley; Judges Jones and Madden concurring, with a dissenting opinion by Judge Littleton, in which Judge Whitaker concurred.

On motions for new trials, and on consideration thereof, it was ordered on April 6, 1942, that said motions be overruled.

The court on its own motion entered an order amending Finding 5 of the Special Findings of Fact filed December 1, 1941; the former conclusion of law and the majority opinion of the court to stand; a concurring opinion by Judge Madden in case No. 45222 being filed; the dissenting opinion by Judge Littleton theretofore filed in case No. 45222 being withdrawn and a new dissenting opinion by Judge Littleton, in which Judge Whitaker joins, being filed in said case.

The amended Special Findings of Fact are as follows:

1. Plaintiff is a New York corporation with its principal place of business in New York City.

2. On March 1, 1922, plaintiff was the owner of certain real property located on Varick Street in New York City on which was situated a building which had been constructed in 1921 according to defendant's specifications and was primarily adapted for post-office facilities. March 1, 1922, plaintiff leased that property to the defendant for a period of twenty years from and after October 1, 1921, the lease providing that the building should be—

> * * * for the use of the United States, as and for a post office to be known as Varick Street Station, New York Post Office aforesaid, for, during, and until the full end and term of twenty (20) years then next ensuing, from and after the first day of October A. D. nineteen hundred and twenty-one, rental to commence on

> the date of occupancy, provided Congress shall make the necessary appropriation therefor from year to year, or authorize the payment of such rental, and subject to termination as hereinafter provided, and the said party of the sixth part yielding and paying therefor, unto the said party of the first part, its successors or assigns, from and after the date last above mentioned during the time of occupation by the United States of the said premises under this lease, rent at the rate of four hundred thousand dollars ($400,000) for the first year of the term and at the rate of three hundred thousand dollars ($300,000) per annum for the balance of the term, in quarter-yearly payments, to wit: on the first day of January, April, July, and October in each and every year during such occupancy, such payment to be made at the above-mentioned post office, subject to the necessary appropriation from year to year as aforesaid, or otherwise as may be provided by law.

The lease contained no express provisions as to cancellation except as to certain contingencies which did not arise and are not here material. However, at the date of the execution of the lease, the Act of March 3, 1885 (23 Stat. 386), was in force and effect and provided in part as follows:

> A lease shall cease and terminate whenever a post office can be moved into a Government building.

The foregoing provision was repealed June 19, 1922, in an Act (42 Stat. 656) reading insofar as here material as follows:

> That that part of the Act approved March 3, 1885 (Twenty-third Statutes at Large, page 386), which provides that a lease for premises for use as a post office shall cease and terminate whenever a post office can be moved into a Government building, is hereby repealed.

3. Pursuant to the provisions of the lease, defendant entered into possession of the leased premises and continued to occupy them and pay rent therefor up to and including August 31, 1939.

4. In preparing its estimates for the fiscal year ended June 30, 1940, the Post Office Department took into consideration the fact that during the first six months of that fiscal year a federal building should be ready for occupancy

in New York City into which it was contemplated the activities carried on in plaintiff's leased premises would be transferred, and accordingly included in its estimates rent for the premises for only the first six months of that year. The Post Office Department submitted its total estimates for rent for the various Post Offices throughout the United States to the Bureau of the Budget which reduced the total amount by $75,000 and Congress made a further reduction of $150,000. The Post Office Appropriation Bill for the fiscal year ended June 30, 1940, carried an appropriation—

> For rent, light, fuel, and water for the first-, second-, and third-class post offices and the cost of advertising for lease proposals for such offices, $10,450,000.

5. The Acting Postmaster General on May 27, 1939, wrote plaintiff as follows:

> The Solicitor of this Department has ruled that the twenty-year lease for the quarters occupied by Varick Street Station of the New York, New York, post office, dated March 10, 1922, beginning October 1, 1921, is cancellable upon three months' notice whenever it is found possible to remove all of the postal activities therefrom to a Government-owned building.
>
> You are, therefore, informed that the Department elects to cancel the contract on account of the occupancy of a Federal building, and will yield up and surrender possession of the premises to you as lessors at the close of business on August 31, 1939.

In response to letter from the plaintiff June 2, 1939, addressed to the office of the Postmaster General, the solicitor of the Post Office Department by letter to plaintiff June 16, 1939, stated:

> *   *   *   *   *
>
> The basic proposal under which these quarters were occupied was dated September 9, 1920, and was accepted September 30, 1920. That proposal read that it was "subject to the provisions of the form of lease used by the Post Office Department (three (3) months' notice cancellation clause to be eliminated)." At that time the form of lease used by the Department contained two cancelation clauses reading as follows:
>
> "* * * and, it is further agreed that this lease shall cease and terminate whenever the post office for the

use of which this lease is made can be moved into a Government building."

"* * * and, that this lease may be terminated whenever in the discretion of the Postmaster General the interests of the Postal Service require it upon giving at any time three months' notice thereof."

The first clause quoted above was statutory. In other words, the law as constituted at that time required that this clause appear in all leases and therefore the clause was not subject to elimination by mutual agreement or otherwise. There was no statutory bar to an agreement whereby the second clause quoted above should be eliminated. Therefore in the consummation of the contract containing a provision that the "three months notice cancelation clause" should be eliminated it necessarily followed that the other (statutory) clause was retained. It further appears that the Department wrote to the lessor on December 17, 1920, further clarifying the matter by specifically pointing out that only the second clause would be eliminated.

The cancelation of this lease was in accordance with the terms of the contract, and the law as constituted at that time under which the Government reserved the right to cancel the contract at any time the activities of the station should be moved to a Federal building.

6. Plaintiff on August 31, 1939, wrote the Postmaster General of the United States as follows:

In response to our earlier letter to you, we received a letter from the Solicitor of the Post Office Department advising us that the Post Office Department rests its claim to cancel this lease on various letters and proposals dated prior to the 1st of January 1921.

The lease was dated March 1, 1922, and was executed on March 10, 1922.

Of course, all negotiations leading to the lease were merged in the lease.

In the lease there is no reference whatsoever to any right of cancellation for the reasons now put forward by the Solicitor for the Department.

The owners of the building and more than one thousand holders of the bonds of the Corporation have relied upon the Post Office Department fulfilling its obligation as set forth in its contract.

We decline to accept the cancellation and protest against this drastic action on your part, and we shall expect the Government to pay the rent for the remainder of the term of the lease, in accordance with its contract.

7. August 31, 1939, defendant, pursuant to notice given to plaintiff in its letter of May 27, 1939, vacated plaintiff's leased premises and moved its post-office facilities therefrom into a government-owned building which was then completed and available for that purpose. The defendant has not occupied the leased premises since that date and has paid no rental for any period subsequent to August 31, 1939.

8. Had defendant occupied the leased premises as a post office during the period for which rent is claimed in this suit, plaintiff would have been required to make expenditures for water rent and miscellaneous items under the provisions of the lease in the amount of $2,040.30, whereas during that period plaintiff actually expended on that account an amount of $1,417.05, that is, an amount of $987.25 less than the amount which would have been expended had the defendant's occupancy continued throughout the period.

9. Plaintiff made demands on defendant for the following payments which it contends were payable to it under the provisions of the lease:

$25,000 due on October 1, 1939.
75,000 due on January 1, 1940.
75,000 due on April 1, 1940.
75,000 due on July 1, 1940.

$250,000

These demands have been refused and no part thereof has been paid.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

In this action plaintiff seeks to recover $250,000 as alleged rent due for the nine-month period beginning September 1, 1939, and ending June 30, 1940, on certain premises in the city of New York which the defendant previously occupied as a post office.

Plaintiff on March 1, 1922, entered into a lease with the Post Office Department for the use of certain premises for a period of twenty years from October 1, 1921, at a specified rental of $400,000 for the first year and $300,000 per annum for the balance of the term, payable in quarterly installments. The lease did not contain any express provision giving defendant the right of cancellation at any time during its term. There was in effect, however, at the time of its execution, the Act of March 3, 1885 (23 Stat. 386) which provided in part:

> * * *: and a lease shall cease and terminate whenever a post office can be moved into a Government building.

This provision of the statute was repealed June 19, 1922.

Defendant erected its own post-office building, and on May 27, 1939, when it appeared that the building would be ready for occupancy as a postal station and defendant was desirous of moving into it, plaintiff was notified of defendant's election to cancel its lease and surrender plaintiff's premises at the close of business on August 31, 1939. Plaintiff declined to accept the cancellation and protested the vacating of the premises by the defendant. However, defendant removed its facilities from the premises to the Government building and vacated the premises on August 31, 1939. Since that time the defendant has not occupied the premises nor paid rental therefor.

The sole question presented is whether defendant had the right to cancel the lease prior to the expiration of the twenty-year term.

Although the lease did not contain an express provision giving defendant the right of cancellation, nevertheless, at the time the lease was entered into, the Act of 1885, *supra*, was in effect providing that a lease should cease and terminate whenever a post office could be moved into a Government-owned building. This provision of the statute was as much a part of the lease as if it had been written therein and formed a part of the contractual relations of the parties. As was said by the court in *Farmers and Merchants Bank of*

Monroe, North Carolina, v. *Federal Reserve Bank*, 262 U. S. 649, 660:

> Laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms.

Plaintiff contends, however, that the Act of 1885, *supra*, having been unreservedly repealed, took out of the lease the cancellation clause provided for in that act. In other words, that the repeal of this statute on June 19, 1922, had a retroactive effect which left the lease without any cancellation clause and made the Government responsible for the rental for the full term of the lease.

Before the statute was repealed the lease had been executed and the right of cancellation was interwoven into it by the then existing statute. The only way in which it could be taken out would be to give the statute a retrospective effect, which is contrary to the well-accepted rule that a statute will not be given a retrospective effect unless its terms show a legislative intention to so operate.

In *United States* v. *Heth*, 3 Cranch, 399, 413, the general rule was laid down that—

> Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

This rule has been followed ever since. See *United States* v. *Burr*, 159 U. S. 78, 82, 83.

In *Miller* v. *United States*, 294 U. S. 435, 439, the court held:

> The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears. *Twenty per Cent. Cases*, 20 Wall. 179, 187; *Chew Heong* v. *United States*, 112 U. S. 536, 559; *Fullerton-Krueger Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435, 437.

There was a total absence of any expressed retrospective legislative intention in the repealing statute of June 19, 1922, but, on the contrary, the whole legislative history of the re-

peal statute was that it should be prospective only in its application. The situation as represented to the Congress at that time was that the landlords were charging higher rentals for leases of their buildings because of the uncertainty of the duration of the lease, due to the right of the Government to cancel at any time when it could move to its own building. The statute was repealed in order to procure better rental terms in the future. (Congressional Record, Vol. 62, part 5, 67th Congress, 2nd Session, page 4932; Congressional Record, Vol. 62, part 7, 67th Congress, 2nd Session, page 6911; Report of the Joint Commission on Postal Service, 67th Congress, 1st Session, Senate Document No. 74, page 20.)

Plaintiff's lease had been executed almost four months before the repeal statute had been passed. There is nothing in the record to show that plaintiff expected the repeal statute to be passed or that the Government received any benefit from the long-term lease by way of reduction of rent.

Plaintiff relies on two decisions of this court in *Twin Cities Properties, Inc.*, v. *United States*, 87 C. Cls. 531 and 90 C. Cls. 119. These cases are clearly distinguishable. The plaintiff in these cases was unwilling to enter into a lease which had a cancellation clause and the negotiations show that the Department was urging Congress to repeal the Act of 1885, and if the Act of 1885 had not been repealed the premises would not have been leased. There were two leases in question, both executed after the repeal of the Act of 1885. The first lease contained a cancellation clause and, when it was drawn to the attention of the Department that it was inadvertently inserted, this lease was cancelled and another lease, without the cancellation clause, was entered into according to the agreement of the parties. Clearly it appeared in these cases that the Government received the benefit of the repeal of the statute of 1885 and obtained lower rentals.

The defendant contends that plaintiff should not recover because Congress had not made an appropriation for the payment of the rental after August 31, 1939. It is not necessary to consider this question because we have held above that plaintiff is not entitled to recover under its lease for

a further period than August 31, 1939, under defendant's right of cancellation as contained in the Act of 1885.

The petition is dismissed. It is so ordered.

Jones, *Judge*, concurs.

Madden, *Judge*, concurring:

I agree with the opinion of the court, and wish to make some additional observations.

Plaintiff relies heavily upon the oft-repeated statement of courts and text-writers that repeal statutes are to be given a retrospective effect unless a contrary legislative intent is shown. An examination of the cases in which the courts have so decided shows that the statutes in question have been, in most instances, expressive of a public policy which the legislature, by the repeal, intended to abandon or modify. Penal statutes, usury statutes, and statutes relating to procedure are examples.

In the repeal of a penal statute, the legislature is expressing a change of policy. Conduct which the state had, before the repeal, regarded as worthy of punishment, is to be regarded as innocent, or less blameworthy, after the repeal. In those circumstances it is almost certain that if the legislature had considered the question of what should be done about those persons who had committed, before the repeal, the henceforth legally innocent act, and whose offenses had not been adjudicated before the repeal, the legislature would have wished that the state should not apply the penalty. The reasons for applying it, the removal of the offender from society so that he may not again offend, the deterrent effective upon others to keep them from engaging in the same conduct in the future, have disappeared.

Usury statutes present somewhat the same aspect. The repeal of the usury law represents a change in policy on the part of the state, and once the policy is changed, high rates of interest contracted for in the past are no more reprehensible than those to be contracted for in the future. Similarly in dealing with procedure statutes, the courts have not regarded either party to a law suit, pending or prospective, as having any unchangeable right to have his case tried according to some particular rule. On the other hand, it

would produce confusion to try some suits under one procedure, and others, in which the cause of action had occurred earlier, under another.

When statutes dealing with what we may call substantive rights are repealed, other questions arise. If state legislation is repealed, and the repeal, if construed as retrospective, would impair the obligation of a contract or would arbitrarily take property, the question of the statute's constitutionality can be avoided by giving the repeal statute only a prospective interpretation.[1] Then too the difficult question of whether the "right" asserted under the repealed statute rises to the dignity of a contract or property right, entitled to constitutional protection, is escaped by construing the statute as having prospective operation only, leaving undisturbed the arrangements which parties have made on the basis of the repealed statute.

When a tax statute is repealed, it is usually succeeded by another. Yet the repeal of the old statute is never held to have the effect of preventing the government from collecting the taxes which fell due before the repeal.[2] The repealed statute is still the law for proper cases.

In these types of cases in which the courts habitually give only prospective effect to repealing statutes, we again feel fairly certain as to what the desire of the legislature would have been, if it had expressed that desire. In these cases, then, although the repealing statute contains not a word to indicate that it is to have only a prospective operation, and its language seems to wipe the former statute from the books for all purposes, yet the courts have given such statutes only a nonretrospective construction.[3] This seems to mean that the unqualified language of a repeal statute will as readily carry the nonrestrospective construction as the restrospective one which the bare words would seem to require.

[1] See *Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 194, 204–5; *Duke Power Co.* v. *South Carolina Power Commission* (C. C. A. 4th Cir.), 81 F. (2) 513.

[2] See *Blakemore* v. *Cooper*, 15 N. D. 5, 106 N. W. 566; *Commonwealth* v. *Mortgage Trust Co.*, 227 Pa. 163, 76 Atl. 5.

[3] See *Ettor* v. *City of Takoma*, 228 U. S. 148; *Bank of Norman Park* v. *Colquitt County*, 169 Ga. 534, 150 S. E. 841; and see cases cited in notes 1 and 2.

Concurring Opinion by Judge Madden

A consideration of the way in which the courts have handled these various types of cases leads one to the conclusion that in construing repeal statutes as to their retrospective or prospective operation, as in construing other writings, if it is evident what the legislature would have desired, if it had devoted its attention to the problem, that is the construction to be given to the statute if its language will bear that construction, and to the further conclusion that language of unqualified repeal will bear with equal ease either a retrospective or merely prospective construction. The controlling consideration seems to be the subject matter of the repealed statute, from which the probable intent of the legislature may be inferred.

In the case at bar, the Act of March 3, 1885, in effect at the time the lease was made, conferred upon the Government the valuable privilege of moving out of the leased property and into its own, if property of its own should become available, and thus escaping any further payments of rent. Plaintiff argues that the defendant lost this privilege when, some months after the lease was made, the Act of March 3, 1885, was repealed.

Here the repeal represented no change in Congressional policy as to the right or wrong of a post office lease being cancellable. It had a single aim, to obtain lower rent in future leases by assuring to future landlords that the agreed rent would be paid for the full period of the lease. Its only retrospective effect, if it so operated, would be to give away valuable privileges had by the Government in leases made before the repeal, and to confer corresponding benefits upon landlords who had surrendered those benefits for a consideration satisfactory to them. It is hard to believe that Congress, if it had given its attention to this question specifically, would have done that, and equally hard to imagine what reason a proponent of such a course would have advanced for it. If the earlier statute had conferred a correspondingly valuable cancellation privilege upon the landlord of a lease to the Government for post office purposes, a repeal statute would not be construed to have destroyed that privilege, even assuming that such a construction did not en-

counter constitutional impediments.[4] I think that language which would not be construed to take away a right of the citizen ought not to be construed to give away a corresponding right of the Government.

As to whether there is any more equity in plaintiff's position than there would have been if it had made its lease before there was any movement on foot to repeal the Act of March 3, 1885, this may be said: It was made clear to plaintiff in 1920 that the lease would be subject to the cancellation statute. In the period of a year and four months which elapsed before the lease was actually executed, there developed, as plaintiff probably knew, the prospect of a repeal of the statute. If the amount of the rent which plaintiff was willing to accept was reduced at all by the prospect of repeal, no evidence discloses that fact. If plaintiff, without disclosure to the defendant, took the prospect of repeal into consideration in setting the rent, it could hardly have been upon any other basis than this; that Congress may—probably will—repeal the cancellation statute; that if it does, the courts may give a retrospective effect to the repeal. I do not think that plaintiff's speculation, if it occurred, upon that kind of a possibility on a possibility can be translated into an equity which should determine the meaning of the statute in question.

LITTLETON, *Judge*, dissenting:

I am unable to agree with the opinion of the majority and the concurring opinion in this case. I think they fail to meet and adequately answer the question presented. This case presents an important question of contract law and statutory interpretation. No decision has been found which is entirely decisive on the facts and circumstances of this case under the general rule that the positive authority of a decision is coextensive only with the facts on which it is made. However, the decided cases, I think, announce and establish the legal principles which when applied to the facts and circumstances of this case provide the correct answer.

[4] See *Lynch* v. *United States*, 292 U. S. 571.

Plaintiff in this suit, which was instituted July 9, 1940, seeks to recover the stipulated rental due under the lease for the months of September 1939 to June 1940, inclusive, in the principal amount of $250,000 with a credit of $987.29, the lease having been canceled by the Postmaster General, effective as of August 31, 1939. By its terms the lease did not expire until September 30, 1941, and in another suit, No. 45269, recovery is sought for the rent stipulated in the lease for the subsequent quarter, July 1 to September 30, 1940. The contention made by counsel for the defendant in this case is as follows: "Defendant's position is that the act of 1885 which was subsisting law at the time of the creation of the lease here in question entered into that lease and became a part of it just as clearly as if its language had actually been retained in the lease; that the repeal of that, which repeal took place after the lease in question was entered into, did not and could not delete that provision from the lease."

The majority opinions sustain that contention on the ground—first, that the existing statute entered into the contract; second, that the repealing act of June 19, 1922, was not retroactive; and, third, that it may be assumed that if Congress had deliberately put its mind on the matter of the possible effect of the repealing act upon existing contracts it would probably have expressed an intention that a future contingent right of the government under the repealed statute should not be affected by the repealing enactment.

The first two grounds stated may be conceded, but I think they stop short of answering the question presented, and the third is not, in my opinion, a permissible interpretation of a statute since the language of the statute in question is plain and its effect is, and was at the time, well established.

The lease contract, which was for a period of 20 years from October 1, 1921, was executed March 10, 1922, and did not itself contain any provision giving the defendant the right to cancel the lease if a publicly owned building should become available during its term and, as will hereinafter be shown, it appears that the United States, represented by the Postmaster General, and plaintiff intentionally left out of the lease such a provision as a contractual

stipulation by the parties, thereby leaving the matter of whether the lease would or would not terminate or be subject to cancelation to depend solely on the continued existence or nonexistence of the statutory provision in the act of March 3, 1885, 23 Stat. 385, 386. That statute contained a clause, among others, that a lease for a post office should cease and terminate whenever a post office could be moved into a government building. Had the termination clause of the Act of 1885 been in force and effect, or if the existing statutory saving clause (sec. 29, Tit. 1, U. S. Code), which impliedly and by operation of law was incorporated in and became a part of the repealing act of June 19, 1922, had continued the termination clause of the 1885 Act or had saved the future contingent right in the Postmaster General to cancel the lease, his action in canceling the lease effective as of August 31, 1939, would have been in all respects legal. But the termination clause of the Act of 1885 was not in force and effect at the time the lease was canceled and had not been for 17 years prior thereto. The saving clause, which became a part of the repealing act and expressed the intention of Congress as fully and effectively as if it had been incorporated in and enacted as a part of the repealing act, did not continue the lease liable to termination nor preserve the right of the Postmaster General to cancel it. That saving clause only preserved the Act of 1885 as to a liability incurred or a right accrued at the time of the repeal, neither of which existed in this case.

The Act of March 3, 1885, *supra*, was in force at the time the contract of lease was signed by the parties on March 10, 1922, and that act did give the defendant the right to terminate the lease in a certain event, and, of course, that right could be exercised under the statute by the defendant upon the happening of such event, even though such right was not given by the lease as a contractual stipulation as distinguished from the existing statute, providing the statutory provision was in force at the time the right to terminate or cancel accrued. *College Point Boat Corp.* v. *United States*, 267 U. S. 12; *Russell Motor Car Co.* v. *United States*, 261 U. S. 514; *De Laval Steam Turbine Co.* v. *United States*, 284 U. S. 61, 73. However, the contingency upon the hap-

pening of which the Act of 1885 conditioned the right to terminate a lease, and upon which the lease might have been canceled, never arose while the Act of 1885 was in effect, and the repeal of that act without any provision effectively saving the future right to terminate the lease presents a question which was not considered or decided in any of the cases cited in the opinions of the majority.

The right to terminate or cancel the lease did not arise until May 27, 1939, after the Act of 1885 had been repealed on June 19, 1922, and when it was no longer the law, either by a contractual stipulation or by statute, that the defendant might terminate or cancel the lease if a publicly owned building should become available. Therefore when the Postmaster General in 1939 canceled the lease he was not exercising any authority given to him by the contract, nor was he exercising any power or authority conferred upon him by law. The authority which he previously had under the Act of 1885 had been taken away. As will hereinafter be shown, the contract was made and signed when the matter of the repeal of the Act of 1885 was under consideration by Congress and at a time when it appeared probable that that act would be repealed.

There can be no doubt that the repeal of a statute operates upon and affects existing arrangements and contracts, and destroys or abrogates all rights existing under the repealed act which had not become vested prior to the repeal or which are not preserved by an appropriate provision to that end, or by some express contractual stipulation. Thus, in *Hertz, Collector*, v. *Woodman*, 218 U. S. 205, 216, the court said:

> There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say, that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute. *United States* v. *Reisinger*, 128 U. S. 398; *Curtis* v. *Lovett*, 15 N. Y. 9, 152 *et seq.*; *Town of Belvidere* v. *Warner R. R. Co.*, 34 N. J. L. 193; 1 Lewis' Sutherland Stat. Const., secs. 282 *et seq.*

See also *Crawford's Stat. Const.*, secs. 93, 296, 316; *Black, Interpretation of Laws* (1911), sec. 124, p. 421; *Canal Co.* v. *Ray*, 101 U. S. 522, 527.

The case of *Louisville Woolen Mills* v. *Johnson*, 228 Fed. 606, furnishes a good illustration of those rights which are lost by repeal of a statute and those which are not. In that case Section 2487 of the Kentucky Statutes was in effect when the Louisville Woolen Mills contracted with the Tapp Clothing Company to furnish it certain supplies. This statute gave the vendor a prior lien in the case of an assignment for the benefit of a creditor. While this statute was in force a portion of the goods was delivered, and a portion was delivered after the statute had been repealed. The court held that as to those goods which were delivered prior to repeal of the statute the vendor had a lien, but as to the goods delivered under and pursuant to the contract after repeal of the statute it did not have a lien.

When the Act of 1885 was repealed, the right of the Postmaster General to terminate or cancel the lease no longer existed and it no longer existed because the Government through an act of Congress took away the right. At the time of the enactment of the Act of June 19, 1922, repealing the Act of 1885, Congress knew that there were a number of long-term leases outstanding; in fact, there were 4,281 of such outstanding and existing leases for terms of from 5 to 20 years. In 1922, before this lease was made and signed and before the enactment of the repealing act, the attention of the Joint Commission on Postal Service had been called to the fact that the premises covered by the 20-year lease in the case at bar had not been completed, and the matter of the acquisition of those premises by the department was discussed before the Commission at some length. The Postmaster General on November 15, 1921, in his annual report for the fiscal year ended June 30, 1921, pursuant to section 388, U. S. Code, Title 5, reported to Congress that there were 4,281 long-term existing leases. While it is true that the repealing Act of 1922 was prospective in operation, it, nevertheless, affected existing leases insofar as a future contingent right of the Government under the Act of 1885 was concerned, the only authority for the exercise of which

was contained in the repealed statute, and not as a distinct contractual stipulation by the parties in the lease. While it is also true that by virtue of a statutory provision that a lease should cease and terminate upon the happening of a specified event "the right to cancel became, by implication, one of the terms of the contract" because that statutory provision was in effect at the time the contract was signed,—*College Point Boat Corp.* v. *United States, supra; Russell Motor Car Co.* v. *United States, supra; Farmers and Merchants Bank of Monroe, North Carolina, et al.* v. *Federal Reserve Bank of Richmond, Va.*, 262 U. S. 649, 660—the subsequent repeal of that statutory provision with an existing express saving clause which did not preserve the right to cancel, impliedly as well as expressly, I think, took away the right to cancel. Ordinarily a statute is not given a retrospective effect, but this rule does not apply in the case of a repealing statute so far as concerns its effect upon existing or future rights; such a statute operates to eliminate from the law the statute repealed and to destroy all rights thereunder, unless these rights had become vested prior to the repeal or were such that the legislature or Congress was without authority or power to impair or change. See *Lynch* v. *United States*, 292 U. S. 571; *Indiana ex rel. Anderson* v. *Brand, Trustee*, 303 U. S. 95. In *Railroad Co.* v. *Grant*, 98 U. S. 398, 401, 403, involving a case where Congress in 1879 repealed a former statute, the court said:

> It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. [Citing cases.] Sec. 847 of the Revised Statutes, * * * is in irreconcilable conflict with the act of 1879. * * *.
>
> The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the

> rescinding act finds them, unless special provision is made to the contrary. * * *
>
> It is claimed, however, that, taking the whole of the act of 1879 together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the act which in express terms indicates any such intention. Usually where a limited repeal only is intended, it is so expressly declared * * *. Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose. * * * No declaration of any such object on the part of Congress is found in the law; and when, if it had been the intention to confine the operation of what was done to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed.

See also to the same effect, *Bank of Hamilton* v. *The Lessee of Ambrose Dudley*, 2 Pet. 492; *Norris* v. *Crocker et al.*, 13 How. 429; *Dodge v. Woolsey*, 18 How. 331; *United States* v. *Tynen*, 11 Wall. 88, 95; *Gross* v. *U. S. Mortgage Company*, 108 U. S. 477; *Flanigan* v. *Sierra County*, 196 U. S. 553; *Hubert* v. *New Orleans*, 215 U. S. 170; *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276; *Mackenzie* v. *Hare et al.*, 239 U. S. 299; *Thompson* v. *United States*, 246 U. S. 547; *Iselin* v. *United States*, 270 U. S. 245, 251; *United States* v. *Chambers*, 291 U. S. 217; *Massey* v. *United States*, 291 U. S. 608.

In the case at bar the contingency in which the defendant had the right to cancel this lease never arose while the statute giving it this right was in effect, and the contract, under which the Postmaster General purported to act, did not by any stipulation then in force or effect expressly or impliedly give him that right. Therefore, no right to cancel existed in 1939 and no such right had ever become vested while the Act of 1885 was in force. *Cf. Steamship Company* v. *Joliffe*, 2 Wall. 450, 458. The repeal of the statute effectively eliminated any effect which it therefore

had upon the contract, since there can be no question as to the authority of Congress to do this or to waive a statutory or contractual right intended solely for its benefit. The Act of 1885 was enacted for the benefit of the defendant. Even though the statute had actually been incorporated in the lease, it could be waived by Congress, who had imposed the condition, because it was incorporated and intended for the benefit of the government. *Wade, Retroactive Laws* (1880), sec. 25, p. 29; *Sheehy* v. *Mandeville and Jamesson*, 6 Cranch 253, 263; *State of Maryland* v. *Baltimore & Ohio R. R. Co.*, 3 How. 534, 542, 546; *Shutte* v. *Thompson*, 15 Wall. 151, 159; *Jones* v. *United States*, 96 U. S. 24, 28; *United States* v. *Reisinger*, 128 U. S. 398, 401; *Hays* v. *Port of Seattle*, 251 U. S. 233, 237. The later unqualified repeal of the statute saving only incurred liabilities or accrued rights was a waiver of benefits conferred upon the defendant by the repealed portion of the prior act.

We are not here concerned with a contract between private parties entered into in the light of a statute giving to one of the parties a certain right subsequently taken away or impaired by repeal of the statute which conferred it. In such cases, as the decisions will show, the Supreme Court has always found it necessary to decide whether the legislature possessed the authority completely to take away the remedy or to impair the right or obligation. The Supreme Court has never been able in such cases to adopt the easy expedient of presuming that such a statute should be construed, in the absence of clear language to that effect, as intended to affect or operate only upon future arrangements or contracts. Here, no act of a third party affecting the contract is involved. No question as to an unlawful impairment of an obligation, express or implied, of a contract is present. See *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 79, 90–93; *City of Worcester* v. *Worcester Consolidated Street Railway Company*, 196 U. S. 539, 548, 552. Here the contracting party to whom the right to terminate the lease was given is the government which enacted the statute giving the right. Clearly it later had the power to forego this statutory right if it chose to do so. This it did when it unqualifiedly repealed the statute giving the

right with an existing express proviso (sec. 29, Tit. 1, U. S. Code) which did not save the right.

The repealing act with the existing saving statute is plain and unambiguous, and should be interpreted and applied without resort to construction. However, if construction is necessary, I think the views and conclusions hereinbefore stated are fully supported by facts and circumstances disclosed by the written records, which the court can consider (*United States* v. *Dickerson*, 310 U. S. 554; *United States for use of Noland Co.* v. *Irwin, et al.*, 316 U. S. 23; *New World Life Insurance Co.* v. *United States*, 88 C. Cls. 405), showing the background and history of execution of the lease in the case at bar on March 10, 1922, and of the enactment on June 19, 1922, of the provision of the Post Office Appropriation Act repealing the provision of the Act of March 3, 1885.

The Act of March 3, 1885, supra, making appropriations for the Post Office Department, was the first statute which authorized the making of post-office leases for a term longer than one year. This act authorized the Postmaster General to make leases for terms not exceeding five years. Later, in the Post Office Appropriation Act approved July 2, 1918, 40 Stat. 741, 746, the Postmaster General was authorized to make post-office leases for terms not exceeding ten years. In the Post Office Appropriation Act approved April 24, 1920, 41 Stat. 574, 578, it was provided "That hereafter the Postmaster General may, in the disbursement of the appropriation for such purposes, apply a part thereof to the purpose of leasing premises for the use of post offices, * * *, at a reasonable annual rental, to be paid quarterly for a term not exceeding twenty years." This provision was enacted, as the hearings before the Joint Commission on Postal Service show (Vol. 1, p. 67), in order to enable the department to obtain more favorable rental terms and lower rental in its leases.

In the Post Office Appropriation Bill approved June 19, 1922, 42 Stat. 652, 656, the Congress appropriated $11,750,000 for rent, light, and fuel for first-, second-, and third-class post offices under existing leases and those made or renewed during the fiscal year ended June 30, 1923, and, in the sentence making that appropriation, enacted the clause:

"*And provided further*, That that part of the Act approved March 3, 1885 (23 Stat. at L., p. 386), which provides that a lease for premises for use as a post office shall cease and terminate whenever a post office can be moved into a government building, is hereby repealed." Section 4 of the Act of February 25, 1871, 16 Stat. 431, 432 (sec. 29, Title 1, U. S. Code), the provisions of which are to be treated as if incorporated in and as a part of the above-quoted enactment repealing the Act of 1885 (*Great Northern Ry. Co.* v. *United States*, 208 U. S. 452), provided "That the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Section 6 (a) of the Post Office Appropriation Act approved April 24, 1920, 41 Stat. 574, 583, 584, created a commission on the postal service to be composed of a chairman and four members of the Committee on Post Offices and Post Roads of the Senate, the chairman and four members of the Committee on Post Office and Post Roads of the House of Representatives, and a postal expert appointed by the Postmaster General. Sub-section (c) provided that

> The commission shall investigate all present and prospective methods and systems of handling, dispatching, transporting, and delivering the mails and the facilities therefor; and especially all methods and systems which relate to the handling, delivery and dispatching of the mails in the large cities of the United States.
>
> On or before March 1, 1921, the commission shall make a report to Congress containing a summary of its findings and such recommendations for legislation as it may believe to be proper.

This Joint Commission on Postal Service made investigations itself and through persons employed by it for that purpose. It held formal hearings during the years 1920, 1921, and 1922 at which the Postmaster General, the Solicitor of the Post Office Department and Assistant Postmasters General, and other officials of the Post Office

Department testified. (Hearings before Joint Commission on Postal Service, Vols. 1 and 2).

In a report dated October 27, 1921, 67th Congress, 1st sess., Senate Document #74, p. 20, the Joint Commission recommended that the clause in the Act of 1885, that a lease should cease and terminate whenever a post office could be moved into a government building, be repealed in the interest of economy. Testimony was given before the Joint Commission with reference to long-term post-office leases and with reference to the mandatory provision of the Act of 1885, on certain dates between December 8, 1920, and June 3, 1921.[1]

In this testimony the efficiency expert employed and the officials of the Post Office Department testified and recommended that the termination clause of the Act of 1885 be repealed because it was mandatory and could not be waived, and that it had the effect of not only limiting the number of properties offered for rental but of increasing the rental costs to the Government through increased financing charges which prospective lessors had to pay to banks for funds necessary to finance the project of constructing a special building to suit the peculiar needs of the Post Office Department. Further testimony was given before the Commission with reference to the termination clause of the Act of 1885 by the Postmaster General and his assistants, and a representative of the Pennsylvania Railroad Company, with whom the Postmaster General was then carrying on negotiations for the construction of a special building for the Post Office Department under a lease for twenty years.[2]

On January 10, 1922, the Postmaster General testified before the Commission with reference to pending negotiations for 20-year leases for buildings in New York City to be specially constructed for the Post Office Department by the Pennsylvania Railroad Company and the New York Central Railroad Company, and with reference to the mandatory provision of the Act of 1885 regarding automatic

[1] Hearings before a Joint Commission on Postal Service, Vol. 1, pp. 66, 67, 107–110, 119–121, 207, 208, 234, 235, 580, 581–583.

[2] Hearings before a Joint Commission on Postal Service, Vol. 2, pp. 954–8, 972, 973, 1029, 1035, 1036, 1080, 1087, 1088.

termination of term leases. The Postmaster General testified in part as follows:

> One other proposition on this Pennsylvania deal. We can save about $75,000 a year in rental during the life of the contract if the statute were repealed which requires, or which allows, a cancellation of the contract in the event we want to move into a government building. We could get $1.58 or $1.60 per foot if that did not exist. There is that actual difference in their financing, in the willingness of the bank to loan the money, if you don't have to have in the lease the provision as now required by statute that we can at any time cancel this lease if we have a government building.
>
> Now, if we could get legislation quickly so that we do not have to put that in, we could save $75,000 a year.
>
> Representative ROUSE. Do you want that kind of legislation?
>
> Postmaster General HAYS. Well, $75,000 a year is a great deal of money. It is unfortunate that it costs that much to keep it in. There will be times, probably, where it would be very advantageous to have that provision in leases. The situation right now in the National Treasury and the postal situation in New York is such that we will, in my opinion, not want to cancel that for 20 years. * * *. I do not think there is any chance in the 20 years of our wanting to abandon it. Then we would find ourselves in this position: We would like to have that out so that we could save that large sum of money, and yet there may be times when we would find it advantageous to keep that provision. I think that is a question we ought to consider. That is the situation in New York. We find ourselves able to get a very much better rate by not having it cancelable at the option of the Postmaster General.
>
> Lastly, in that regard, the Commission has recommended its repeal of that—this Commission has. If you think you could get that repeal right away, we ought to take advantage of it in this matter.
>
> The CHAIRMAN. The law ought to be framed so that it could be optional with the department in reference to this matter, so that it would not be compulsory in every case to include that provision. In cases where you are pretty certain that it looks likely that a building would be erected, such an option in the contract would be desirable, but I believe the last administration recommended that it be eliminated, but my understanding from the beginning has been that that should be optional with the

department, in making a contract. Where the department feels it would be desirable to have such an option, it should be included, but where, in such a case as the Pennsylvania Railroad Terminal, where I think your argument is good, it seems to me the insertion of such a provision, if it costs us $75,000, would be unwarranted, and the Congress would not be justified in forcing such an option into the contract.

Postmaster General HAYS. I therefore hope that you will unanimously take such action as will quickly repeal that for the benefit of this contract, making it so that it gives an option as has been recommended by the chairman. * * *.

Representative STEENERSON. The department hasn't submitted any draft for a modification of this clause. It forbids a lease without the provision that it can be canceled when a public building is available. There may be some necessity for carefully considering the wording of that so as to comply with the suggestion of the chairman.

Postmaster General HAYS. If that is the will of the Commission, and I cannot see but one side of that, we will at once prepare a bill—get it to you right away—as to how we think it should be worded, so that you can go over the actual bill.

CHAIRMAN. You can present that to the committee.

Representative STEENERSON. Submit it to the different committees.

Postmaster General HAYS. That will have to come pretty fast if it is to be of value.

Representative STEENERSON. And I would suggest that you consider the proposition as to whether it should be general or simply applicable to these large cities.

Senator MOSES. Under Senator Townsend's suggestion of an option, optional on the part of the department, I see no reason why it should not be a general enactment.

Representative STEENERSON. I would suggest you submit that to the Senate and House committees, so that they can give it consideration and get it started.

Thereafter, on January 23, 1922, the Postmaster General drafted a proposed act of Congress, which was in the exact language enacted by Congress in the act approved June 19, 1922, as hereinabove quoted, and transmitted that proposed act to the Senate and the House Committees on Post Offices and Post Roads with the following letter dated January 26, 1922:

> Section 322, Postal Laws, and Regulations. (1885, Mar. 3, ch. 34223, stat. 386) reads as follows:
>
> "Whenever any building or part of a building under lease becomes unfit for use as a post office no rent shall be paid until the same shall be put in a satisfactory condition by the owner thereof for occupation as a post office, or the lease may be canceled at the option of the Postmaster General; and a lease shall cease and terminate whenever a post office can be moved into a Government building"——
>
> In the report of the Joint Commission on Postal Service, submitting recommendations relative to additional postal service at Boston and Chicago, the Commission recommended, among other things, that the last clause quoted above be repealed, making it optional with the Postmaster General as to whether or not such a provision shall be inserted in the leases.
>
> When I took this up with the Joint Commission at its hearing on Tuesday, January 10th, the Commission requested the Department to prepare legislation which would make the proper change in this law, and submit it to the Chairman of both the Committee of the Senate and the House for their action. Accordingly we have had the enclosed draft prepared. I would very much appreciate its early consideration by your Committee.

The proposed act as drawn and transmitted by the Postmaster General was introduced in the House of Representatives February 2, 1922, as H. R. 10244, entitled "A BILL Repealing the law relating to the termination of leases for post-office premises." This Bill was referred to the House Committee on Post Office and Post Roads.

On March 3, 1922, before the lease in the case at bar was executed on March 10, the following proceedings were had at the hearings before the Joint Commission on Postal Service (Vol. 2, pp. 135, 136):

> Mr. EDWARDS [Solicitor of the Post Office Department]. Someone said a moment ago that legislation would be necessary. Under the act of 1920, you know, we have the authority to make these leases up to 20 years. No legislation is necessary.
>
> The CHAIRMAN [Senator Townsend]. I understand that clearly.

Postmaster General HAYS. You do not have the authority to do it without a provision to cancel in event of a vacant Government building.

Mr. EDWARDS. We need no legislation at all to execute a lease for 20 years. The statute of April, 1920, provides that a post-office building may be leased for 20 years, and the next paragraph provides that a railway terminal station may be leased for 20 years. * * *

Postmaster General HAYS. You are correct, except that there is a law that says we can lease for 20 years providing no Government building is vacant. If a Government building is vacant, that may cancel the lease.

Mr. EDWARDS. We need no legislation. There is a law—and this is what you have in mind—which says that if another Government building becomes available that automatically cancels the lease. That is all.

The CHAIRMAN. Now, the present committee has voted to recommend—I mean the Post Office Committee now; not the commission—that that provision be omitted from the lease hereafter—that is, the imperative demand that it should be in there—and it will be left to the Postmaster General to determine; in cases, for instance, where we know there is never going to be a post-office building.

Mr. HULME [Pennsylvania R. R. Company]. There was such provision in that statute at the time our proposal was made.

The CHAIRMAN. Would it have made any difference in the bid that you put in if that had been the law then?

Mr. HULME. I think it would, Senator; a very material difference. I think it would have affected the arrangements with the bankers.

Senator WALSH. The interest on the loan?

Mr. HULME. Yes.

The CHAIRMAN. Suppose you put up the proposition to the Postmaster General on the theory that that is omitted.

Mr. EDWARDS. The fact that we would omit that from the contract could not change the law. The statute would still govern.

Postmaster General HAYS. He is assuming that the law will be changed. I am very much in favor of that.

The CHAIRMAN. The committee is in favor of it.

Postmaster General HAYS. It ought to be in the department to make a lease without that.

The CHAIRMAN. We have decided to repeal that law; that is, so far as our committee is concerned—the subcommittee. What the whole committee will do, or what the Congress will do, I do not know. But I feel pretty well satisfied that that provision will be repealed.

Senator WALSH. Your department recommended that, Mr. Hays?

Postmaster General HAYS. Yes.

The CHAIRMAN. You might take that into consideration and see what figures you can get on that proposition.

While the matter of the repeal of the mandatory termination clause of the Act of 1885 thus stood the Postmaster General and the plaintiff executed the 20-year lease involved in the case at bar, which lease was approved in writing as to form by the Solicitor of the Post Office Department, and left out of this lease any stipulation as a matter of contractual agreement between the parties with reference to the lease ceasing or terminating, or being subject to cancelation by the Postmaster General in the future if a Government building should become available. The standard approved form of post-office lease, theretofore and up to that time in use, contained an express provision, as a contractual stipulation, for the right of termination for the several reasons set forth in the Act of 1885. A consideration of the facts and circumstances of this case show that the parties concerned knowingly and intentionally left this particular provision out of this lease because it appeared probable that the termination clause of the Act of 1885 would soon be repealed; and that they expressly included stipulations with reference to all other cancelable provisions of the Act of 1885, and some others in addition. Thus, the parties to this contract left and intended to leave the matter of whether the lease should terminate or be subject to cancelation on that ground to the continued existence or repeal of the Act of 1885. Neither party to the contract of lease thought that such a contingency would arise during its term of twenty years from October 1, 1920, and the Postmaster General a few days before had so testified before the Joint Commission on Postal Service. It had previously been the practice of the Postmaster General to include in post-office leases an express provision as a contractual stipulation

by the parties that "And, it is further agreed that this lease shall cease and terminate whenever the post office, for the use of which this lease is made, can be moved into a Government building." And, as above stated, the standard printed form of post-office lease theretofore used contained that stipulation. However, that standard form of lease, to that extent, was not used in this case but was differently written by the parties at the time so as to express their intention. Thus we have, in substance, the same situation as was present in the case of *Twin Cities Properties, Inc.* v. *United States*, 87 C. Cls. 531, 541, in which case the negotiations for the lease were concluded December 29, 1921. Here they were concluded in September 1920. The proposal to construct a building and lease it in the *Twin Cities case* was accepted February 24, 1922, and the lease was finally executed when the building had been completed and accepted in October 1922 with the cancelable clause in the lease, but which, as the evidence showed, the parties did not intend should be in it.

Of course in the case at bar or in any case where a lease was executed before the Act of 1885 was repealed, the Postmaster General was without power or authority to waive a provision of an existing statute, but he had authority as the authorized contracting officer for the United States to make and execute a lease which would only be subject to termination or cancelation in the future if the Act of 1885 remained in effect. It is clear that this was what he did. "A Government contract should be interpreted as are contracts between individuals, with the view of ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument." *Hallerbach* v. *United States*, 233 U. S. 165, 171, 172. Contracts made by the government are governed by the same rules as apply to contracts between individuals. *Hunter* v. *United States*, 5 Pet. 173, 185; *United States* v. *Bostwick*, 94 U. S. 53, 66; *C. & N. W. R. Co.* v. *United States*, 104 U. S. 680, 685; *Perry* v. *United States*, 294 U. S. 330, 351, 352.

The plaintiff in this case proposed in September 1920, after negotiations, to construct a building to the satisfaction of the defendant, and, after such building had been so con-

structed and accepted, to lease the same for a certain rental to the defendant for a term of 20 years from October 1, 1921. There was, of course, at that time no completed contract but only an offer to make a contract. *Cf. Ship Construction & Trading Co., Inc., v. United States*, 91 C. Cls. 419. One year, to October 1, 1921, was allowed within which to construct the building to the defendant's satisfaction. All negotiations were merged into the contract of lease subsequently executed which expressed all the agreements of the parties. The hearings before the Joint Commission on Postal Service, (April 6, 1921, Vol. 1, pp. 207, 208), show that plaintiff had experienced some financial difficulties and had been delayed in the completion of the building for the Varick Street Parcel Post Station. The building appears to have been completed and accepted on or about March 10, 1922. The lease, when made and executed, was therefore not one for twenty years, as the parties had originally contemplated would be the case, but only for about nineteen years and six months. This situation doubtless had some bearing upon the action of the parties in leaving out of the contract an express provision for termination of the lease. When the lease was executed on March 10, 1922, there was reasonable probability that the termination clause of the Act of 1885 would be repealed. The Joint Commission on Postal Service had so recommended and had instructed the Postmaster General to draft the desired legislation to accomplish that purpose, and he had done this and transmitted the proposed bill to the appropriate committees of the Senate and the House with his positive recommendation that the existing statute be repealed. Therefore, the Solicitor of the Post Office Department was in error when he wrote plaintiff on June 16, 1939, that the action of the Postmaster General canceling the lease was in accordance with the terms of the contract, for the reason that the contract contained the provision that "It is further agreed that this lease shall cease and terminate whenever the post office, for the use of which this lease is made, can be moved into a Government building." Of course, the contract did not contain that stipulation. If such a provision as a distinct contractual stipulation of the parties had been in the lease when it was canceled in

1939, we would have a different question. Compare *Hood & Gross* v. *United States*, 90 C. Cls. 258; *James I. Barnes* v. *United States*, 92 C. Cls. 32; *United States* v. *Kansas Flour Mills Corporation*, 314 U. S. 212; *Dameron & Kenyon, Inc.* v. *United States*, *ante*, p. 133. The Postmaster General had no authority, and claimed none, under any existing statute to cancel the lease and I think it is clear that he had no legal right to do so under any express or implied stipulation of the lease.

The next phase of the question relates to the contention of counsel for the Government that the repealing act of June 19, 1922, was wholly prospective and was intended by Congress to apply only to leases subsequently made. The repealing act was, as held by the court in *Railroad Company* v. *Grant*, 98 U. S. 398, 401, 403, "undoubtedly prospective in its operation." It was not expressly retroactive and was not intended to be retroactive so as to become effective at some prior date, as is true of all such statutes, but this does not answer the question here involved. The act was effective from the moment of its approval and, as has uniformly been held by the Supreme Court, it affected and operated upon existing and future rights and liabilities of the parties under an existing arrangement or contract which depended upon the repealed statute. When the 1922 Act was approved the Postmaster General no longer had authority under the repealed act to cancel the contract.

While it is true that one of the purposes, and it may be said the principal purpose, considered by Congress in repealing the Act of 1885 was its effect upon the cost to the government of long-term leases, this does not warrant the court in departing from the rule that courts must presume that Congress meant the language employed should have its usual and ordinary signification, or warrant the court in engrafting upon the statute a proviso not justified by its language, or by the express saving clause which became a part of the enactment as fully as if it had been incorporated as a part thereof. As was held by the court in *Farmers' Loan & Trust Co.* v. *Oregon & C. Ry. Co.*, 24 Fed. 407, a plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a surmise or

conjecture, however probable, that the legislature did not actually contemplate, or consciously intend, its application thereto. *County of Schuyler* v. *Thomas*, 98 U. S. 169; *McBroom* v. *Scottish Mortgage and Land Investment Company*, 153 U. S. 318. In *Thompson* v. *United States*, 246 U. S. 547, it was held that the intention of Congress is to be sought primarily by the language used, and where this expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture. *United States* v. *Fisher*, 2 Cranch, 358, 399; *United States* v. *Wiltberger*, 5 Wheat. 76, 96; *Doggett* v. *Florida Railroad*, 99 U. S. 72; *Lake County* v. *Rollins*, 130 U. S. 662, 670; *Danciger* v. *Cooley*, 248 U. S. 319, 326; *Moore* v. *United States*, 249 U. S. 487, 489; *De Ganay* v. *Lederer*, 250 U. S. 376, 381; *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98, 101.

The Act of June 19, 1922, as it passed the House of Representatives January 13, 1922, did not contain any provisions modifying or repealing any provisions of the Act of 1885. The matter of repeal of the Act of 1885 was not discussed in the hearings of the House Appropriation Committee on this bill. The appropriation bill which became the Act of June 19, 1922, was considered by the Commmittee on Post Offices and Post Roads of the Senate and was reported by that committee to the Senate March 13, 1922, with amendments. The chairman of this committee was the chairman of the Joint Commission on Postal Service which had been for some time, and was then, considering the matter of postal leases and of the repeal of the termination clause of the Act of 1885. As reported by the Senate Committee, the appropriation bill contained the following amendments—"For rent, light, and fuel for first, second, and third-class postoffices, $12,000,000; * * *. *And, provided further*, That hereafter a lease shall not cease or terminate when a postoffice can be moved into a Government building, unless the Postmaster General deems it to be in the interest of the public service." The appropriation bill as amended was accompanied by a report of the Senate Committee on Post Offices and Post Roads, Report No. 556, 67th Cong., 2d sess. In this report the committee quoted,

in part, from the Annual Report of the Postmaster General for the fiscal year ended June 30, 1921, with reference to certain matters, and stated as follows:

> Increased rental charges for post-office quarters during the past few years have caused material increases in the appropriation for this item. As a result of the advance in rentals the department has been unable to renew leases, even for short periods, at either the old rate or slight increase, thus necessitating entering into new leases at increased rates. * * *.
>
> It is the opinion of the committee, considering the increases in rentals and the extraordinary demand for enlarged quarters for the handling of parcel post mail, that the appropriation for rent, light, and fuel should be fixed at $12,000,000 instead of $11,600,000, as proposed in the House bill.
>
> The fixed charges against this appropriation as of January 31, 1922, were $11,345,000, with 536 leases expiring in 1923, which, under present conditions, will have to be renewed at increased rentals of from 40 to 90 per cent, an average of about 60 per cent. * * *.
>
> The further proviso under this item that leases shall not cease or terminate when a post office may be moved into a Government building, unless the Postmaster General deems it to be in the interest of the public service, gives the Postmaster General proper authority to exercise his best judgment. It is believed that a large amount of money can be saved to the Government in the low rents paid if the department is permitted to buy rather than rent furniture and fixtures, and by eliminating the usual provision for lease cancellation in case the Government moves into its own building where there is no probability of moving into such building. It is a reasonable and proper provision.

It seems obvious from the above-quoted amendment, which was approved by the Senate March 20, 1922, that the bill would, if it had finally been enacted in that form by both houses of Congress, have applied to existing leases, as well as to those thereafter made, for the reason that the language used was that thereafter *a* lease, that is *any* lease, should not cease or terminate except in the discretion of the Postmaster General even if a Government building should become available; and this would have been true under the clear language of that provision, because it was speaking of future termi-

nation, although the main purpose in its enactment, as stated by the committeee and by the chairman on the floor of the Senate, was the probable saving to the Government in the cost of future leases. However, the above-mentioned amendment was subsequently eliminated in conference on the appropriation bill, and the repealing provision, as theretofore drafted and recommended by the Postmaster General, was enacted instead under the circumstances as hereinafter more fully stated.

On March 21, 1922, the House of Representatives ordered the Post Office Appropriation Bill as passed by the Senate printed, and disagreed with the Senate amendments. On March 24 and 25, 1922, the House Committee on Post Office and Post Roads held hearings on legislative amendments which had been made by the Senate to the Post Office Appropriation Bill, one of which amendments was the modification of the Act of 1885 so as thereafter to leave it discretionary with the Postmaster General as to whether any post-office lease should cease or terminate if a Government building should become available. At that time H. R. 10244 for the outright repeal of the termination clause of the Act of 1885 was pending before the House Post Office and Post Roads Committee and the hearings were held by that committee on this bill in connection with the amendments passed by the Senate. On March 23, 1922, the Postmaster General wrote the chairman of the House Committee on Post Office and Post Roads approving and urging the enactment into law of H. R. 10244 in place of the Senate amendment (House Report #839, 67th Congress, 2d sess.). The Solicitor of the Post Office Department and the Superintendent of the Post Office Service appeared before the House Post Office and Post Roads Committee and testified in support of the enactment of the repealing act as provided in H. R. 10244 in lieu of the amendatory provision which had been approved by the Senate. This was thirteen days after the lease in the case at bar had been approved and signed by the Postmaster General and the Solicitor of the Post Office Department without any stipulation agreeing that it would cease and terminate, or be subject to cancelation on the ground on which the Postmaster Gen-

eral canceled it seventeen years later. These hearings before the House Post Office and Post Roads Committee also show that the pending bill, H. R. 10244, for the repeal of the mandatory termination clause of the Act of 1885 had been discussed with the chairman of the House Appropriation Committee, who was also chairman of the House Conference Committee, on the disagreement with the Senate amendments, and that the Conference Committee of the House favored the enactment of the repealing act in lieu of the Senate amendment. On March 27, 1922, the House Committee on Post Office and Post Roads recommended the passage of H. R. 10244 repealing the law relating to the termination of post-office leases without amendment. Thereafter, in the conference between the Senate and the House on the Post Office Appropriation Bill, the Senate receded from its amendment modifying the termination clause of the existing statute and agreed to the enactment as a provision of the appropriation bill of the exact provisions of H. R. 10244. As so amended in conference, the Appropriation Bill was enacted by both Houses apparently without further discussion and became the Act of June 19, 1922.

From all of this it is manifest, I think, that it was the clear intention of Congress that the enactment of this repealing provision with the provision of the existing law, sec. 29, Tit. 1, U. S. Code, as an express proviso thereto should have force and effect according to the usual and ordinary signification of the language used. There is, therefore, no warrant for an assumption based on conjecture or after-acquired wisdom that if Congress had deliberately put its mind directly upon the matter it might have expressed some other intention. Such an assumption amounts to judicial legislation which is uniformly condemned. Where, as here, the language of the statute is clear and sufficient to express a definite purpose as to its effect, a court should not supply, by assumption, a different intention by interpolating its notions of policy into the legislative provisions. The statute of 1922 as it was enacted when interpreted and applied consistently with section 29, Tit. 1, U. S. Code, definitely expresses the intention as to its limitations.

If there exists a basis for any assumption of any

intent other than that disclosed and expressed by the usual and ordinary signification of the language of the enactment and the applicable saving clause, it would seem that the intention was no more than that accrued or incurred rights or liabilities under existing leases should be preserved and that whether any lease should in the future terminate or be subject to cancelation should depend upon whether such lease contained, as a matter of contractual stipulation or agreement by the parties, an express provision to that effect.

During the time of consideration and enactment of the repealing act, Congress had before it the Annual Report of the Postmaster General made in November 1921 for the fiscal year ended June 30, 1921, and the testimony of the Postmaster General before the Joint Commission on Postal Service, which showed that long-term leases were entered into by the department only "where the terms of such leases are advantageous to the Department."

In his Annual Report to Congress for the fiscal year July 1, 1920, to June 30, 1921 (pp. 25, 26) the Postmaster General stated in part as follows:

> Quarters for post offices of the first, second, and third classes, or what are known as presidential offices, come under three general classes, namely, Federal buildings, leased quarters, and rented buildings. Leased quarters are under a term contract, varying from 1 to 20 years, which usually includes rent, light, fuel, and the necessary permanent equipment. Where the terms of the lease are advantageous to the department, contracts are entered into for a long period, ranging from 5 to 20 years. * * *.
>
> Of the 14,058 presidential offices on June 30, 1921, 1,113 were housed in Federal buildings, of which 652 were first-class offices, 453 of the second class, and 8 of the third class. Of the remaining 12,945 offices, quarters are provided under term leases at 4,281, and 8,064 occupy quarters under a rental agreement without lease, leaving 600 offices for which postmasters are furnishing quarters without an allowance therefor from the department. * * *.
>
> At no time within the history of the Postal Service has the question of housing been so serious. This condition is due to three general causes, viz, the enormous increase in the volume of mail, with particular reference

to parcel post, the restrictions laid upon building operations during the war, and the high cost of labor and building materials still prevailing.

Owing to the last two factors, practically all Government building operations were suspended during the war, and they have not since been resumed. * * *. In many instances, notably in New York, Chicago, Boston, Cleveland, Indianapolis, Pittsburgh, Cincinnati, Los Angeles, Newark, etc., the quarters in the Federal buildings have long since been outgrown, and the only immediate avenue of relief is the establishment of stations and annexes.

During the year a total of 879 lease contracts were made, involving an annual expenditure for quarters of $1,954,436. Of this number, 77 were for new projects—chiefly in the larger cities—at a yearly cost of $598,680, while 802 were necessitated by expiring and canceled leases. In many instances larger and more centrally located quarters were imperative, which greatly added to the cost. The total annual rental of these 802 leaseholds is $1,355,756, an increase of $819,365, or 153 per cent, over the previous contracts.

The greater proportion of this increase was of course made in the large cities—for instance, Varick Street Station of New York with 163,156 square feet of floor space, requiring a rental outlay of $400,000 for the first year and $300,000 per annum thereafter, the period of the lease being 20 years. In Boston we have an annex, chiefly for parcel post, the rental for which is $125,000 a year, and in Chicago and St. Paul similar stations at like rentals.

* * * * *

Negotiations are now pending for necessary additional buildings in New York and other large cities which will involve large expenditures in rentals in 1922.

I find no justification in the record, or in the congressional hearings or reports, for the contention of counsel for the defendant that the Postmaster General in 1939 had the clear right to cancel the lease because it was strictly a contractual right and that it was a privilege "bought and paid for, and remains unaffected by repeal of the statutory provision." The testimony of the Postmaster General given to Congress before the repealing act was enacted and before the lease was executed clearly showed, as hereinbefore indicated, first, that term leases were entered into only where the rental to be paid

by the Government was reasonable for the facilities acquired; second, that long-term leases enabled the Government to get lower rentals; third, that in long-term leases buildings were specially constructed by the lessor to suit the peculiar needs of the Post Office Department and, prior to advertising for bids, negotiations were always carried on with the owner of the property at the location where the department desired to establish a postal station, which negotiations included all phases of financing costs and expenses to the lessor and the total amount to be paid by the Government as an annual rental, so as to produce no more than a reasonable return to the lessor upon his costs and investments in providing a building according to the specifications of the department; and fourth, that any amount which the Government might have to pay in connection with the annual rental, because of the existence of the termination clause of the Act of 1885, was due in almost every case to increased costs to the lessor in financing the project by reason of an increase in the rate of interest or financing charge made by the banks and not an increase in the return to the lessor.

It seems clear to me that at the time this lease was canceled by the Postmaster General in 1939 neither the contract itself nor the law conferred upon him authority to do so.

The majority opinions do not discuss the other defense interposed, to wit, that no appropriation has been made for payment of the rent under this lease. I do not think this feature of the case has any merit or that it requires much discussion. I am of opinion that this defense is not good. *Twin Cities Properties, Inc.* v. *United States*, 90 C. Cls. 119, 130. See, also, *Collins* v. *United States*, 15 C. Cls. 22; *Freedman's Savings & Trust Co.* v. *United States*, 16 C. Cls. 19; *Spofford* v. *United States*, 32 C. Cls. 452; *Ferris* v. *United States*, 27 C. Cls. 542. There were only two references in the lease to the matter of appropriation by Congress, but these references clearly were not intended as a basis for termination or cancelation of the lease by the Postmaster General. The law under which the Postmaster General acted in making the lease specifically authorized him to make the lease for a term of twenty years. And it further authorized him "in the disburse-

ment of the appropriation for such purposes, to apply a part thereof to the purpose of leasing premises." Moreover, there was no deliberate refusal of Congress to appropriate money for the payment of rent under valid leases, and even if there had been such a refusal the lessor would not, as a matter of law, be barred from recovery if the lease was otherwise legal and valid, as I think it was. The first reference in the lease to the matter of appropriation by Congress was the provision inserted clearly for the benefit of the lessor as a condition to the stipulations and covenants of the lessor to keep, at his own expense, such building, including heating, lighting, plumbing fixtures, etc., in good repair and condition during the full term of the lease to the satisfaction of the Postmaster General and to furnish and supply, at its own expense without increased rental, such additional heating and lighting fixtures as the increasing needs of the service might require in the opinion of the Postmaster General, and to keep the additional heating and lighting fixtures in like good repair and condition, with all the ways of ingress and egress, and all of the rights and privileges thereunto belonging for the use of the United States, as and for a post office for, during, and until the full end of the term of twenty years then next ensuing, and thereafter from the first day of October, 1921. The other reference to appropriation by Congress from year to year had reference solely to the promise of the Postmaster General to pay the stipulated annual rental quarterly for the full term of the lease of twenty years. In other words, the Postmaster General simply stipulated, as would have been true without any express stipulation, that so far as his authority to pay the stipulated rental from year to year was concerned, he, as an executive officer, could only disburse Government funds to the extent appropriated and it was therefore provided in the lease that his unconditional promise to pay the rent at the rate of $400,000 for the first year and at the rate of $300,000 for the balance of the term of nineteen years, was "subject to the necessary appropriation from year to year, as aforesaid, or otherwise as may be provided by law." Had Congress refused without justifiable cause to make an appropriation for the payment

of rent due under a lease made by its express authority, such action would have amounted to a breach of the contract. *Cf. Hays* v. *Port of Seattle*, 251 U. S. 233; *Wells* v. *Roper*, 246 U. S. 335. As a matter of fact, in this case, the situation was simply that the Postmaster General had undertaken to cancel the lease upon what he thought was justifiable ground and he only asked for an appropriation, so far as this lease was concerned, of an amount sufficient to pay the stipulated rental to August 31, 1939, when he moved the postal facilities out of the leased premises, and Congress simply appropriated the total amount of $10,450,000 for the fiscal year ending June 30, 1940, on May 6, 1939, for the payment of rent, etc., any part of which the Postmaster General was authorized under existing law to disburse for the payment of rent for leased premises. Cases like *Hooe* v. *United States*, 218 U. S. 322, are not applicable.

I am of the opinion that the plaintiff is entitled to recover under its contract with the defendant.

WHITAKER, *Judge*, concurs in this opinion.

EASTERN BUILDING CORPORATION v. THE UNITED STATES

[No. 45269. Decided April 6, 1942]*

On the Proofs

Lease of post office premises; cancelation under the Act of March 3, 1885—Following the decision in No. 45222, p. 399, *ante*.

The Reporter's statement of the case:

Mr. Homer S. Cummings for the plaintiff. *Mr. Raymond E. Hackett* was on the brief.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Henry Fischer and Elihu Schott* were on the brief.

*Plaintiff's petition for writ of certiorari denied by the Supreme Court, October 12, 1942.

The facts in this case (No. 45269) were in all respects similar to the facts in No. 45222, p. 399, *ante*, except that the period for which rental was claimed in the instant case was from July 1 to September 30, 1940, at the quarterly rental of $75,000.

Following the decision in No. 45222, the Court on December 1, 1941, in an opinion *per curiam*, held that the plaintiff was not entitled to recover and the petition was dismissed.

Motion for new trial being overruled, the court on April 6, 1942, on its own motion, filed amended findings of fact, as follows:

1. Plaintiff is a New York corporation with its principal place of business in New York City.

2. On March 1, 1922, plaintiff was the owner of certain real property located on Varick Street in New York City on which was situated a building which had been constructed in 1921 according to defendant's specifications and was primarily adapted for post office facilities. March 1, 1922, plaintiff leased that property to the defendant for a period of twenty years from and after October 1, 1921, the lease providing that the building should be—

> * * * for the use of the United States, as and for a post office to be known as Varick Street Station, New York Post Office aforesaid, for, during, and until the full end and term of twenty (20) years then next ensuing, from and after the first day of October, A. D. nineteen hundred and twenty-one, rental to commence on the date of occupancy, provided Congress shall make the necessary appropriation therefor from year to year, or authorize the payment of such rental, and subject to termination as hereinafter provided, and the said party of the sixth part yielding and paying therefor, unto the said party of the first part, its successors or assigns, from and after the date last above mentioned during the time of occupation by the United States of the said premises under this lease, rent at the rate of four hundred thousand dollars ($400,000) for the first year of the term and at the rate of three hundred thousand dollars ($300,000) per annum for the balance of the term, in quarter-yearly payments, to wit: on the first day of January, April, July, and October in each and every year during such occupancy, such payment to be made at the above mentioned post office, subject

to the necessary appropriation from year to year as aforesaid, or otherwise as may be provided by law.

The lease contained no express provisions as to cancellation except as to certain contingencies which did not arise and are not here material. However, at the date of the execution of the lease, the Act of March 3, 1885 (23 Stat. 386), was in force and effect and provided in part as follows:

> A lease shall cease and terminate whenever a post office can be moved into a Government building.

The foregoing provision was repealed June 19, 1922, in an Act (42 Stat. 656) reading insofar as here material as follows:

> That that part of the Act approved March 3, 1885 (Twenty-third Statutes at Large, page 386), which provides that a lease for premises for use as a post office shall cease and terminate whenever a post office can be moved into a Government building, is hereby repealed.

3. Pursuant to the provisions of the lease, defendant entered into possession of the leased premises and continued to occupy them and pay rent therefor up to and including August 31, 1939.

4. In preparing its estimates for the fiscal year ended June 30, 1941, the Post Office Department did not include any amount for the rental of the premises here in question. The Post Office Appropriation Bill for the fiscal year ended June 30, 1941, carried an appropriation—

> For rent, light, fuel, and water for first-, second-, and third-class post offices and the cost of advertising for lease proposals for such offices $9,975,000.

5. The Acting Postmaster General on May 27, 1939, wrote plaintiff as follows:

> The Solicitor of this Department has ruled that the twenty-year lease for the quarters occupied by Varick Street Station of the New York, New York, post office, dated March 10, 1922, beginning October 1, 1921, is cancellable upon three months' notice whenever it is found possible to remove all of the postal activities therefrom to a Government-owned building.

> You are, therefore, informed that the Department elects to cancel the contract on account of the occupancy of a Federal building, and will yield up and surrender possession of the premises to you as lessors at the close of business on August 31, 1939.

In response to letter from the plaintiff June 2, 1939, addressed to the office of the Postmaster General, the solicitor of the Post Office Department by letter to plaintiff June 16, 1939, stated:

> The basic proposal under which these quarters were occupied was dated September 9, 1920, and was accepted September 30, 1920. That proposal read that it was "subject to the provisions of the form of lease used by the Post Office Department (three (3) months notice cancellation clause to be eliminated)." At that time the form of lease used by the Department contained two cancellation clauses reading as follows.
>
> "* * * and, it is further agreed that this lease shall cease and terminate whenever the post office for the use of which this lease is made can be moved into a Government building.
>
> "* * * and, that this lease may be terminated whenever in the discretion of the Postmaster General the interests of the Postal Service require it upon giving at any time three months' notice thereof."
>
> The first clause quoted above was statutory. In other words, the law as constituted at that time required that this clause appear in all leases and therefore the clause was not subject to elimination by mutual agreement or otherwise. There was no statutory bar to an agreement whereby the second clause quoted above should be eliminated. Therefore in the consummation of the contract containing a provision that the "three months' notice cancelation clause" should be eliminated it necessarily followed that the other (statutory) clause was retained. It further appears that the Department wrote to the lessor on December 17, 1920, further clarifying the matter by specifically pointing out that only the second clause would be eliminated.
>
> The cancellation of this lease was in accordance with the terms of the contract, and the law as constituted at that time under which the Government reserved the right to cancel the contract at any time the activities of the station should be moved to a Federal building.

6. Plaintiff on August 31, 1939, wrote the Postmaster General of the United States as follows:

> In response to our earlier letter to you, we received a letter from the Solicitor of the Post Office Department advising us that the Post Office Department rests its claim to cancel this lease on various letters and proposals dated prior to the 1st of January, 1921.
>
> The lease was dated March 1, 1922, and was executed on March 10, 1922.
>
> Of course, all negotiations leading to the lease were merged in the lease.
>
> In the lease there is no reference whatsoever to any right of cancellation for the reasons now put forward by the Solicitor for the Department.
>
> The owners of the building and more than one thousand holders of the bonds of the Corporation have relied upon the Post Office Department fulfilling its obligation as set forth in its contract.
>
> We decline to accept the cancellation and protest against this drastic action on your part, and we shall expect the Government to pay the rent for the remainder of the term of the lease, in accordance with its contract.

7. August 31, 1939, defendant, pursuant to notice given to plaintiff in its letter of May 27, 1939, vacated plaintiff's leased premises and moved its post-office facilities therefrom into a government-owned building which was then completed and available for that purpose. The defendant has not occupied the leased premises since that date and has paid no rental for any period subsequent to August 31, 1939.

8. Had defendant occupied the leased premises as a post office during the period for which rent is claimed in this suit, plaintiff would have been required to make expenditures for water rent and miscellaneous items under the provisions of the lease in the amount of $721.29, whereas during that period plaintiff actually expended on that account $425.13, that is, an amount of $296.16 less than the amount which would have been expended had the defendant's occupancy continued throughout the period July 1 to September 30, 1940.

9. Plaintiff made demand on defendant for the quarterly payment of $75,000 which it contends was payable to it under the provisions of the lease for the period July 1 to September 30, 1940. That demand has been refused and no part thereof has been paid.

The court decided that the plaintiff was not entitled to recover, in an opinion *per curiam*, as follows:

This case is governed by the decision of the court in the case of *Eastern Building Corporation* v. *The United States*, No. 45222, decided this date. The petition is therefore dismissed. It is so ordered.

LITTLETON, *Judge*, and WHITAKER, *Judge*, dissent for the reasons set forth in the dissenting opinion in said case No. 45222.

J. H. CRAIN AND R. E. LEE WILSON, Jr., TRUSTEES OF LEE WILSON & COMPANY, A BUSINESS TRUST, v. THE UNITED STATES

[No. 45300. Decided April 6, 1942]*

On Demurrer

Bankhead Cotton Act of 1934; tax exemption certificates; liability of Government.—Where a common law business trust, of which plaintiffs are trustees, purchased tax exemption certificates issued under the Bankhead Cotton Act (48 Stat. 598), which act imposed a tax upon the amount of cotton ginned and moved into commerce from the 1934–35 crop in excess of a stipulated number of bales; and where tax exemption certificates to cover the stipulated number of bales were issued by the Secretary of Agriculture to cotton producers; and where such tax exemption certificates were negotiable and were traded in among cotton producers and through a pool of such certificates established for that purpose by the Secretary of Agriculture; and where said business trust purchased such certificates by check payable to the pool manager; and where such tax exemption certificates so purchased were surrendered by said business trust to the Collector of Internal Revenue in payment of the ginning tax on cotton; it is *held* that plaintiffs' allegations are insufficient

*Plaintiff's petition for writ of certiorari denied by the Supreme Court. October 19, 1942.

to establish an obligation on the part of the United States by way of a contract, either express or implied in fact, within the provisions of section 145 of the Judicial Code (U. S. Code, Title 28, section 250).

Same.—The Government collected no tax in connection with the issuance of the tax exemption certificates; the proceeds did not go into the general fund of the United States Treasury.

Same; constitutionality.—In the light of the decisions in *United States* v *Darby*, 312 U. S. 100, 113, and *Mulford* v. *Smith*, 307 U. S. 38, it is not to be presumed that the Bankhead Act was unconstitutional.

Same.—Whether the Bankhead Act was constitutional or not, the United States Government is not obligated to repay to the plaintiffs, out of the general fund of the Treasury, sums paid by said trust for the purchase of tax exemption certificates, since the said trust paid no tax which went into the Treasury.

Same; Second Deficiency Appropriation Act of 1938.—If plaintiffs had paid the tax under the Bankhead Act in money, plaintiffs would have been precluded from maintaining suit for recovery by the provisions of the Second Deficiency Appropriation Act of 1938 (52 Stat. 1114, 1150) which made final, in the absence of fraud, a decision by the Commissioner of Internal Revenue on claim for refund of taxes paid in money under said Bankhead Act.

Same.—The claim of plaintiffs does not come within the provisions of the Second Deficiency Appropriation Act of 1938 and is not limited by the provisions of said Act.

Same; pool of certificates.—The pool of tax exemption certificates established by the Secretary of Agriculture to facilitate the sale and transfer of such certificates issued under the Bankhead Act was established for the benefit of the cotton producers and was not established for the purpose of collecting revenue.

Mr. Geo. E. H. Goodner for the plaintiffs. *Messrs. D. F. Prince* and *Scott P. Crampton* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The facts sufficiently appear from the opinion of the court.

JONES, *Judge*, delivered the opinion of the court:

Plaintiffs as trustees of a common law business trust doing business under the trade name of Lee Wilson & Company, seek to recover the amount paid for tax exemption

certificates issued under the Bankhead Cotton Act (48 Stat. 598).

The act became effective April 21, 1934. It imposed a tax at the rate of 5.67 cents per pound [1] upon the ginning of cotton from the 1934–35 crop produced and marketed in excess of amounts allotted by the Secretary of Agriculture. The amount of cotton exempted from tax was fixed under the terms of the act at 10,000,000 bales for the year involved.

The requirements of the law could be satisfied either by the payment of the amount of the tax or by the surrender of tax exemption certificates which were transferable. Upon receipt of payment in cash or upon the furnishing of a tax exemption certificate bale tags were issued. Cotton could not be moved into commerce without a bale tag affixed thereto.

Ten million tax exemption certificates were issued by the Secretary of Agriculture to cover an equal number of bales. The Commissioner of Internal Revenue collected all taxes. If anyone held an exemption certificate for a bale of cotton no tax was paid to or collected by the Commissioner on such bale. The exemption certificates were allotted to individual farmers and became the property of such farmers. They were negotiable.

If a farmer produced more than his allotted share of what it was estimated the market would absorb in any one year, this extra production was classed as surplus cotton. The farmer who produced it had a choice of three courses: (1) he could sell it in the open market, in which event he paid the tax; (2) he could purchase tax exemption certificates from a farmer who had not produced the amount of his quota, or from a pool of such certificates; or (3) he could take the surplus production home and store it on his farm or in a public warehouse without paying the tax and could include it within his quota for the following year and thus market it without tax payment.

If a farmer produced less than his market allotment, he could dispose of his excess certificates in one of two ways: (1) he could surrender the excess certificates to a pool estab-

[1] 50 per centum of the average price at central markets, but not less than 5 cents per pound.

lished by the Secretary of Agriculture, in which event he would participate proportionately in the net proceeds of the sale of certificates made by the pool manager to farmers who had produced more than their allotment; or, (2) with the approval of the county agent, he might sell them to another farmer, if one could be found in his locality who had produced more than his allotment, in which event he received the full proceeds of the sale without any deduction for expenses. Thus whether the individual farmer voluntarily joined the pool or chose to sell his excess certificates to another farmer, in neither event did the Government have any interest in the proceeds.

Plaintiffs allege that since 1934 Lee Wilson & Company have been engaged in the production, ginning, and sale of cotton; that the Department of Agriculture established a pool under the provisions of the Bankhead Cotton Act for the purpose of enabling producers of cotton to purchase tax exemption certificates; that on various dates plaintiffs purchased on behalf of Lee Wilson & Company and its tenants tax exemption certificates in the aggregate sum of $67,326.24; that of the aforesaid sum $1,402.92 was expended to purchase certificates of exemption for plaintiffs' tenants, and the balance, $65,923.32, for certificates for the use of the trust; that certificates were paid for by checks made payable to the pool manager and were endorsed by him over to the general fund of the Treasury of the United States; and that plaintiffs surrendered the tax exemption certificates so purchased to the Collector of Internal Revenue in payment of the ginning tax on cotton, and received bale tags which were affixed to the cotton.

It is further averred that the Department of Agriculture offered inducements to tax payers to purchase certificates of exemption; that the payments were made under duress of goods and compulsion, that the Bankhead Cotton Act has been held unconstitutional and has been repealed, and that timely application for refund of the amount paid for the certificates was made and was rejected.

Plaintiffs sue to recover $65,923.32 expended in the manner indicated.

The Bankhead Act was repealed February 10, 1936 (49 Stat. 1106).

The Supreme Court has not passed directly upon the constitutionality of the Bankhead Cotton Act. True, in the case of *United States* v. *Butler*, 297 U. S. 1, the Supreme Court held that the processing tax provisions in the Agricultural Adjustment Act of 1933 were invalid. In that act (48 Stat. 31), however, the taxes were levied on the processing of all of the commodity that was produced with a drawback on that portion which flowed into foreign markets. The resulting funds were used to make benefit payments to farmers who limited or curtailed production. Emphasis was placed on reduced production. The first powers conferred on the Secretary of Agriculture in the 1933 act were "to provide for reduction in the acreage or in the production for market or both, of any basic agricultural commodity." The court held that the processing fees were intimately linked to control of production which the court held to be a local matter and without the scope of Congressional powers.

The Bankhead Cotton act provided for tax on the ginning of the *excess* or surplus production only. It was to be collected only if the surplus was to be marketed or moved into commerce. Its first stated purpose was "to promote the orderly marketing of cotton in interstate and foreign commerce". It placed emphasis on commerce. The second Agricultural Adjustment Act, known as the Agricultural Adjustment Act of 1938 (52 Stat. 31), followed largely the same pattern as the Bankhead Act. It provides penalties on the marketing of surplus production. It also emphasizes commerce.

In *United States* v. *Darby*, 312 U. S. 100, 113, it was held that the power of regulating interstate commerce extends even to the point of prohibiting it. We quote:

> While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gib-*

bons v. *Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.

In the case of *Mulford* v. *Smith*, 307 U. S. 38, the Supreme Court upheld the provisions of the Agricultural Adjustment Act of 1938, which levied a penalty of 50% on the marketing of tobacco produced in excess of the quotas allotted to producers, on the ground that Congress had provided for the levy in the exercise of its power to regulate interstate commerce. The penalties levied under the provisions respecting tobacco in the Agricultural Adjustment Act of 1938 were similar to the so-called taxing provisions of the Bankhead Cotton Act. The levies in each act were authorized under the same powers and were enacted for the same purpose. In order for plaintiffs to be entitled to recover from the general fund of the Treasury, as for taxes illegally assessed and collected, it would be necessary to hold the taxing provision of the Bankhead Cotton Act invalid. We are not inclined to so hold. In the light of the decisions in the *Mulford and Darby cases*, *supra*, we do not think the plaintiffs are justified in assuming—as the meager presentation of the question in their brief shows they do—that the Bankhead Act was unconstitutional.

However, in view of the allegations in the petition, it is unnecessary to hinge the decision on that uncertainty. Whether the act was valid or invalid, we do not think the United States Government is obligated to pay to the plaintiffs such sums out of the general fund of the Treasury. The plaintiffs paid no tax. They simply purchased tax exemption certificates.

In the Second Deficiency Appropriation Act for the fiscal year 1938 (52 Stat. 1114, 1150) an appropriation was made for the purpose of refunding all amounts collected by the Collector of Internal Revenue as taxes under the Bankhead Cotton Act. The appropriation was conditioned, among other things, by the following:

> *Provided further*, That in the absence of fraud all findings of fact and conclusions of law of the Commissioner of Internal Revenue upon the merits of any such claim for refund, and the mathematical calculations made in connection therewith, shall not be subject to

review by any court or by any other officer, employee, or agent of the United States: *Provided, further*, That no refund of any tax shall be made under this paragraph unless liability for the payment of such tax was satisfied by the payment of money;

The defendant insists that since the Commissioner has found against the plaintiffs, and since the plaintiffs did not pay the money in cash to the Collector of Internal Revenue, they are precluded from recovery by both of the above quoted restrictions.

Plaintiffs insist that the appropriation by its terms was applicable only to those who had paid the tax directly to the Collector of Internal Revenue in cash, that therefore the restrictions were applicable only to those who had so paid the tax, and that the Appropriation Act contained no direct provision as to bale tags that were secured by the use of tax exemption certificates. Plaintiffs further insist that they are not suing under the Second Deficiency Act which was not intended to cover them, but that they are seeking to recover under Section 145 of the Judicial Code (Title 28 U. S. C. A. Sec. 250).

If plaintiffs paid the tax they are precluded from maintaining suit for recovery by the plain provisions of the Second Deficiency Appropriation Act.[1] The legislative feature of that act (52 Stat. 1114, 1150) authorized filing of claim for refund of any taxes paid under the Bankhead Cotton Act, but made final, in the absence of fraud, any action by the Commissioner on the merits of the claim. Plaintiffs filed claim for refund which was rejected by the Commissioner.

We are inclined to agree with plaintiffs that they do not come within the provisions of the Second Deficiency Act, and are therefore not limited by its provisions.

However, in taking themselves outside of the inhibitions of the act, they practically take themselves out of the taxpaying category. They endeavor to take themselves away from the restrictions of the Second Deficiency Act by showing that they did not pay the tax in money, and at the same

[1] *Cook v. United States*, 115 Fed. (2d) 463.

time endeavor to recover under the general provision of law by alleging that "the liability of plaintiffs for the payment of said ginning tax on cotton was satisfied by the payment of money."

Under the terms of the act ten million bales of cotton were not taxed. This number of tax exemption certificates was delivered to farmers throughout the cotton producing area, and if only 10,000,000 bales had been produced and marketed in 1935 no tax would have been collected. Both the selling and the pooling of the certificates were a redistribution or a reallotment of tax free cotton.

The plaintiffs chose to purchase these exemption certificates at 4 cents per pound rather than pay the tax of 5.67 cents per pound.

The tax exemption certificate pool which was established by the Secretary of Agriculture pursuant to the act, and upon which plaintiffs base their suit, was established to provide facilities for the transfer of the surplus certificates, and not for the purpose of collecting revenue. Its nature and terms are set out in the official regulations issued and printed by the Secretary of Agriculture, the particular regulations being B.A. 19C, dated September 5, 1934.

The first paragraph of Section 104 of such regulations provides for the establishment of a tax exemption certificate pool.

Paragraph (a) of such section provides for a manager and stipulates that "Such manager shall receive and manage and sell or dispose of surplus certificate(s) under trust agreements executed (on a prescribed form) by the several producers participating in the pool."

Subsequent paragraphs set out the details of voluntary participation.

Paragraph (g) provides that the checks made out to the pool manager by those who purchased the certificates shall be deposited with the Treasurer of the United States through the Comptroller of the Agricultural Adjustment Administration, Department of Agriculture, *under a symbol number* [italics supplied], and the disbursements from such fund whether on account of expenses or dividends to producers

shall be made upon voucher drawn by the Manager of the pool.

Paragraph (g) contains the further provision that

> All accounts involved in such receipts, the handling of such funds, the payment of expenses, the determination of each producer's pro rata share of the net returns from the pool, and the issuance of checks in settlement of such shares shall be under the direction of said Comptroller. All expenses incident to the operation of the pool (but not including salaries of the manager or the Assistants in Cotton Adjustment) shall be deducted from the gross receipts.

Paragraph (h) provides that

> The funds remaining in the pool, after deduction of all such expenses as provided above, shall be distributed pro rata to producers in the proportion which the number of pounds represented by the certificate(s) surrendered into the pool by each producer bears to the total number of pounds represented by all certificates surrendered into the pool.

The regulations under which the tax exemption certificate pool was established show that the pool was established—September 5, 1934, after the cotton picking season began—for the benefit of the producers and to prevent some of them from becoming the victims of speculators. They show conclusively that the money was not collected as taxes, but simply placed in a fund and each holder of a certificate given in exchange for surrendering his certificate to the pool an evidence showing that he had an undivided interest in the proceeds of the pool. The regulations show that the money was to be used first for the payment of the expense of operating the pool and the balance was to be distributed share and share alike among the holders of the certificates in proportion to the number surrendered by them. The funds were deposited in a special account. In no other way could vouchers or warrants be issued without additional appropriative action on the part of the Congress. In fact the regulations show the establishment of such special account.

It is true that plaintiffs allege in a general way that the funds were placed in the general funds of the Treasury.

However, their entire case is bottomed on the establishment and operation of the tax exemption certificate pool. A general allegation in the petition that is in direct conflict with the terms of the statute on which they rely and the regulations issued thereunder and which latter furnish the basis for their cause of action is insufficient even for the purposes of demurrer.[1] The regulations, by the terms of which the pool was established, not only do not authorize the placing of any sums arising from the sale of exemption certificates in the general fund of the Treasury, but specifically provide for a special account as well as the method and purpose of disbursement.

If the purchase of these certificates were construed to be a tax then an even more serious question would be presented. The official records of the Department of Agriculture show that more certificates were sold by individual farmers in direct dealings with each other than were sold through the pool, pool transactions amounting to approximately twenty-two million dollars and direct transactions between farmers to approximately thirty million dollars. In the direct purchase and sale between farmers the Department neither participated in nor handled any of the funds. Yet these farmers stand on the same basis as those who purchased from the pool. If there was compulsion in the one case there was compulsion in the other. Is the Government to be liable to each of these farmers? Is the Government to be subjected to the claims of thousands of cotton farmers throughout the cotton producing area who participated in these transactions? What a tangled skein of confusion results when any effort is made to handweave such a pattern.

The sums collected on the cotton that was produced and marketed in excess of 10,000,000 bales were taxes, intended and collected as such, and as such went into the general fund of the Treasury. All these collections were returned to the taxpayers by direct appropriation. The proceeds of the sale of the tax exemption certificates were an entirely different fund.

[1] *Pennie* v. *Reis*, 132 U. S. 464; *Southern Pacific R. Co.* v. *Groeck*, 68 Fed. 609.

It is as if the manager of a show, the price of admission to which was sixty cents, handed a complimentary ticket to A. Not being in a position to use it, A sells it to B for 40 cents. The show is cancelled. Cash tickets are redeemed. B presents his ticket at the window and asks for a refund. The manager would probably say he received none of the funds in the first place. B was not compelled to buy a ticket. He was only required to buy a ticket if he went to the show.

Plaintiffs were not required to pay a tax or buy a certificate. It was only necessary to do so if they wanted to sell more than their share of what the market would absorb that year.

We find no compulsion here. For generations the farmers have been bound down by surpluses with which they were powerless to deal. Glutted markets and ruinous prices were followed by waste and then scarcity with injury to both producer and consumer. Rotting surpluses followed by scarcity and want didn't make sense. As individuals, numerous and widely scattered, farmers were helpless. Modern improved methods had aggravated the problem. Agriculture was prostrate.

A program was fashioned—crude in its beginnings, perhaps, but a program—to apportion the market, yoked to the demand or consumptive need. Linked to the program was a loan feature to carry a reserve supply to assure against shortage.

An effort was made in the instant act to apportion the market among the farmers on a fair basis. If a producer went along with his neighbors and used only his share of the market he was not taxed. If he tried to ride the sacrifices of the other producers by intentionally marketing large excess volumes he was to be taxed. He was out of step and deserved to be taxed.

The normal consumptive demand or market—10,000,000 bales for that year—was not to be taxed. Above that the tax was to be effective.

Some who were allotted certificates would, on account of drought, flood or other mishap, be unable to use their certif-

icates. Others would find a more fortunate season. Hence the exchange or sale of certificates. These amounts were usually small. The man who was a little more fortunate would not mind sharing his good fortune with his less favored neighbor. He was marketing a little more than his share while the man who sold the certificates was marketing a little less. All this money was to go to the farmers, none of it to the Government. But when the amount offered in the market rose above the ten million bales, the excess was to be taxed and the proceeds placed in the general fund of the Treasury.

No one was forced to pay a tax. If he found himself with more cotton than was his share of the market in one year, and really wanted to cooperate, he could hold it over and market it within his quota the following year without paying any tax and without purchasing any certificate. This is all shown in the text of the act and the general act which it supplements. Does this seem commonplace? It is the heart of one of the great movements of modern times.

The Government collected no tax in connection with the tax exemption certificates. Not one penny of the amount paid into the pool went into the general fund of the Treasury of the United States. Taxes are collected by the Commissioner of Internal Revenue or under his direction. The pool funds were handled by the Secretary of Agriculture.

The substance of plaintiffs' suit is a direct drive against the general fund of the United States Treasury as if for money had and received as taxes. As such it is barred by the restrictive provision of the Second Deficiency Act. Realizing this they take themselves out of this classification by their allegations and brief, and at the same time endeavor to cling to the general fund of the Treasury into which none of the sums for which they sue has ever been paid. Plaintiffs' allegations are insufficient to establish an obligation on the part of the United States by way of a contract, either express or implied in fact, to subject the general fund of the Treasury to the payment of the sums which they seek to recover.

The United States had no pecuniary interest in the fund as such. Its officers were merely trustees of a fund belonging to others.

Whether the plaintiffs have any legal interest in the trust fund, or in the balance thereof, if any part of it remains undistributed, is not before the court and is therefore not determined.

Defendant's demurrer to plaintiffs' petition is sustained and the petition is dismissed.

It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, concurring:

I concur in the result reached by the Court. I would place that result upon the ground that no showing has been made to us sufficient to overcome the presumed constitutionality of the Bankhead Act. Since the invalidity of that Act is the major premise of plaintiff's claim, I think we are not faced with the question of whether or not the exaction which plaintiff seeks to recover is a tax, or whether, tax or something else, it would be recoverable if it had been illegally exacted. I would, therefore, not decide those questions.

WHITAKER, *Judge*, dissenting:

I am unable to agree with the majority. I think the demurrer should be overruled.

The purpose of the Bankhead Cotton Control Act was to restrict the production of cotton, not to raise revenue; but it sought to accomplish this purpose through the exercise of the taxing power. In order to restrict the production of cotton, it levied a prohibitive tax on cotton produced in excess of the farmer's quota.

It made provision for satisfying this tax in two ways: (1) by payment of it in money; or (2) by payment of it in tax-exemption certificates, which could be purchased from a farmer who had not raised his quota, either directly or

through the pool; but, whether the tax was satisfied in money or in certificates, it was liability for a tax that was discharged. Whatever it cost a taxpayer to discharge his liability for the tax, I think he is entitled to recover.

It makes no difference that the defendant received no pecuniary benefit from the transaction. It was not looking for pecuniary benefit. It was seeking the restriction of the production of cotton. This result was accomplished. To accomplish it cost the plaintiffs the sum for which they sue. It was a sum exacted from them under the taxing power of the defendant. As Justice Sutherland said in *United States* v. *Updike*, 281 U. S. 489, 494, "Certainly it would be hard to convince such a person that he had not paid a tax." See also *Stahmann* v. *Vidal*, 305 U. S. 61.

If the allegation in the petition that the Act was unconstitutional is true, I think it states a good cause of action and that the demurrer should be overruled.

I have no doubt that it was unconstitutional under the authority of the *Butler*[1] case. Both the Bankhead Act and the first Agricultural Adjustment Act contained exactly the same vices denounced by the Supreme Court in that case.

The Fifth Circuit Court of Appeals held the Act unconstitutional in *United States* v. *Moor*, 93 F. (2d) 422, as did also the Court of Appeals for the District of Columbia in *Thompson* v. *Deal*, 92 F. (2d) 478. In *Stahmann* v. *Vidal*, *supra*, the Supreme Court assumed, but did not decide, it to be unconstitutional.

The taxes having been exacted under an unconstitutional statute, I think the plaintiffs are entitled to recover if the allegations of their petition are proven.

Wherefore, I think the demurrer should be overruled.

[1] *United States* v. *Butler*, 297 U. S. 1.

S. R. BRACKIN v. THE UNITED STATES

[Congressional No. 17766. Decided April 6, 1942. Plaintiff's motion for new trial overruled June 1, 1942]*

On the Proofs

Bankhead Cotton Act of 1934; liability of Government in connection with tax exemption certificate pool.—Under the provisions of the Bankhead Cotton Act of 1934 (48 Stat. 598); it is *held* that the Government collected no tax in connection with the tax exemption certificates issued under said Act and had no pecuniary interest in the fund resulting from the proceeds of sale of such certificates, and plaintiff is accordingly not entitled to recover for the amount expended by plaintiff for the purchase of tax exemption certificates from the pool of said certificates established by the Department of Agriculture under said Act.

The Reporter's statement of the case:

Mr. J. Hubert Farmer for the plaintiff.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a citizen of the United States, a resident of Dothan, Alabama, and a cotton farmer.

2. July 7, 1941, the Senate of the United States passed a resolution, known as S. Res. 136, which reads as follows:

> *Resolved*, That the bill (S. 1628) entitled "A bill for the relief of S. R. Brackin," now pending in the Senate, together with all the accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911; and the said court shall proceed with the same in accordance with the provisions of such Act and report to the Senate in accordance therewith.

*Plaintiff's petition for writ of certiorari denied by the Supreme Court October 19, 1942.

3. The Act of Congress approved April 21, 1934 (48 Stat. 598), commonly known as the Bankhead Cotton Act, was passed to aid in the restoration of the cotton industry to a sound commercial basis by creating an effective balance between the production and consumption of cotton.

That act imposed a tax on the ginning of cotton which was not exempt from the tax, at the rate of 50% of the average central market price per pound of 7/8-inch Middling Spot cotton, but in no event less than 5 cents per pound of lint cotton. The Secretary of Agriculture was directed by the act to proclaim the average central market price of lint cotton, which was the basis for determining the rate of the tax.

4. The act required that each bale of cotton after ginning be identified by a bale tag attached by the ginner, indicating whether the cotton was exempt from tax or the tax had been paid. If the producer elected to store the cotton, a lien card was attached and the cotton could not be disposed of until a tax-free or tax-paid bale tag had been affixed thereto.

5. Cotton producers were entitled to file application for tax-exemption certificates representing the amount of cotton which could be ginned free of tax, and the producers delivered to the ginners from time to time an appropriate number of tax-exemption certificates in exchange for tax-free bale tags.

6. The amount of tax exemption to which a cotton producer was entitled was determined by formulae set forth in the act. After exhausting his tax-exemption certificates, a producer could either pay the prescribed tax to the ginner in cash or he could place his cotton in storage subject to the lien for the tax, or he could purchase further tax-exemption certificates from other cotton producers at prices prescribed by the Secretary of Agriculture as the official transfer rate. This price was sufficiently below the tax rate to represent a fair price to the seller and a substantial saving to the buyer of the certificates.

On May 25, 1934, the tax rate was fixed at 5.67 cents per pound of lint cotton and the certificate transfer rate at 4 cents. On June 18, 1935, the tax rate was increased to 6 cents per pound and the transfer rate raised to 5 cents. On October 21, 1935, the tax rate was reduced to 5.45 cents per pound and the transfer rate lowered to 4 cents.

7. Under the Bankhead Cotton Act an allotment of tax-exemption certificates was made to each cotton farm, upon application filed in accordance with prescribed regulations. The operator of the farm or his authorized agent signed the application, which showed each producer's share of the cotton crop on the farm. When the application was granted tax-exemption certificates were issued on a pro rata basis to and in the name of each producer on the farm, except where, upon the request of the producers concerned the certificates were issued to, administered by, and accounted for by, a trustee.

8. Tax-exemption certificates could be transferred or assigned, in whole or in part, in such manner as the Secretary of Agriculture prescribed. The regulations permitted producers to transfer certificates, for which they had no use, to other cotton producers, and the transactions were duly recorded in the appropriate county office of the Agricultural Adjustment Administration. The rates of transfer were established from time to time by the Secretary of Agriculture.

9. To facilitate the transfer of certificates between producers, when such transfers could not be made by direct contact, the Secretary of Agriculture established a series of three national surplus cotton tax-exemption certificate pools. These pools operated as a convenient medium through which farmers wishing to buy certificates for cotton produced in excess of their allotments could deal with farmers who desired to sell certificates for which they had no present need. The moneys collected by the pools belonged to, and were distributed to, the farmers who had placed their surplus certificates therein for disposition, after deducting a small amount for the administrative expenses of the pool.

10. The remittances made by purchasers of certificates from each pool were deposited by the pool manager in the United States Treasury, and payments to the participants in the pools were made by Government checks. No funds received in connection with the pools were covered into the general fund of the Treasury, and the United States did not profit or receive any benefit from the operation of the pools.

11. Tax-exemption certificates could be offered for sale only when the producers to whom they had been originally issued had suffered a complete or partial crop failure or had produced an amount of cotton less than their baleage allotment under the Bankhead Cotton Act, and the only persons eligible under the regulations to purchase such certificates were cotton producers who had exhausted the certificates issued to them and needed further certificates to cover the ginning of their cotton.

12. Certificates were tendered to the national surplus cotton tax-exemption certificate pools under trust agreements, which provides that the persons tendering the certificates covered by the agreement appointed the manager of the pool as trustee to hold all right, title, and interest which the producers had in the certificates listed in the agreement and authorized the manager to sell from the pool, at such prices and under such terms as were established from time to time by the Secretary of Agriculture, any amount of certificates not in excess of the total amount surrendered by such persons and all other persons executing similar agreements. The agreement further provided that the manager should sell such certificates, or so many thereof as could be sold during the period in which the pool was operated for sales to cotton growers making application for certificates, and that all expenses incident to the operations of the pool should be paid by the manager (except the salary of the manager) and deducted from the gross receipts of the pool, the net balance remaining to be distributed pro rata to the producers who contributed to the pool on the basis of the ratio which the poundage of the certificates surrendered by each such participant under his trust agreement bore to the total poundage of certificates received from all producers

participating in the pool. The trust agreement specified that the pool could be continued or closed at the discretion of the Secretary of Agriculture.

13. Producers who desired to buy cotton tax-exemption certificates from the pools forwarded with their orders for certificates, money orders, cashier's checks, or certified checks, made payable to the order of E. L. Deal, Certificate Pool Manager, and by him endorsed for deposit in the Treasury to the account of G. F. Allen, Chief Disbursing Officer, Division of Disbursement. The funds were deposited in a special trust account.

14. After all funds with respect to a particular pool had been collected and deposited in the special account and the pool had been closed, the expenses of operating the pool were computed and paid, and a payment factor was computed. A check was then issued to each producer who had contributed certificates to the pool in an amount representing his proportionate share of all sales made by the pool, less a small amount for administrative expenses. These payments were made by United States Treasury check.

15. It was the duty of cotton ginners who received cotton tax-exemption certificates from cotton producers to forward such certificates at periodic intervals to appropriate Collectors of Internal Revenue, together with a report showing, among other things, whose and what cotton was covered by the certificates surrendered. This procedure was followed by the ginners.

16. The records of the Department of Agriculture show that in the aggregate $22,423,479.94 was paid for cotton tax-exemption certificates bought through the three national surplus cotton tax-exemption certificate pools. This amount, together with $30,314,399.76, the estimated amount paid for certificates purchased locally, brings the total amount paid for certificates during the two years in which the Bankhead Act was in effect to approximately $52,737,879.70.

In addition to moneys paid for cotton tax-exemption certificates, $1,562,097.69 was paid as taxes on the ginning of cotton under the Bankhead Act. Refunds of such taxes were authorized to be made by the Bureau of Internal Revenue

in accordance with the provisions of the Second Deficiency Appropriation Act, fiscal year 1938.

17. January 25, 1934, the plaintiff entered into a written contract with Henry A. Wallace, Secretary of Agriculture, for and on behalf of the United States, known as the "1934 and 1935 Cotton Acreage Reduction Contract," which is plaintiff's Exhibit 1.

March 21, 1935, the plaintiff executed what was known as the "1935 Supplementary Document Relating to 1934 and 1935 Cotton Acreage Reduction Contract Entered Into in 1934," which is plaintiff's Exhibit 2.

The plaintiff complied with the provisions of the 1934 and 1935 Cotton Acreage Reduction Contract for the year 1935.

All exhibits referred to herein are made a part of these findings by reference.

18. On June 4, 1935, the plaintiff in this case made an application for cotton tax-exemption certificates in connection with a farm consisting of 480 acres located in Henry County, Alabama, and thereafter received five cotton tax-exemption certificates representing 13,255 pounds of lint cotton which could be ginned free of the tax imposed by the Bankhead Cotton Act. The plaintiff used these tax-exemption certificates. However, the plaintiff produced cotton in excess of his allotment, and on November 14, 1935, he purchased from the 1935 pool three tax-exemption certificates representing 8,655 pounds of lint cotton for which he made payment to the pool manager by cashier's check in amount of $346.20, dated November 14, 1935, and drawn on the Headland National Bank, Headland, Alabama. These tax-exemption certificates were purchased at the rate of 4 cents per pound. The plaintiff paid no money to the Collector of Internal Revenue.

At the time the plaintiff purchased the tax-exemption certificates to cover the 8,655 pounds of taxable lint cotton. red tax-lien cards had been attached to that cotton.

19. At the time of the purchase of the three tax-exemption certificates referred to in the preceding finding, each certificate was completed so as to show that it was issued in

the name of S. R. Brackin, the plaintiff, and was dated November 14, 1935.

The cashier's check with which the plaintiff purchased the tax-exemption certificates was endorsed by the Treasurer of the United States, "This check is in payment of an obligation to the United States and must be paid at par. W. A. Julian, Treasurer, U. S."

20. May 27, 1939, the plaintiff filed a claim with the Commissioner of Internal Revenue for the refund of the sum of $800.00, which included the amount claimed in this case, to-wit, $346.20. The claim was rejected by the Commissioner of Internal Revenue by letter dated August 28, 1939 (Exhibit Y to stipulation), the second paragraph of which reads as follows:

> The amount for which refund is claimed does not represent tax paid to a collector of internal revenue, therefore, there is no authority in law under which favorable consideration may be given to this claim. The Second Deficiency Appropriation Act, Fiscal Year 1938, provides for the refunding of all amounts collected by any collector of internal revenue AS TAX under the Bankhead Cotton Act of 1934. No provision is contained in the Act which would authorize the refund of amounts expended in the purchase of cotton tax-exemption certificates.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This action is based upon a resolution of the United States Senate (S. Res. 136, 77th Congress, 1st session) authorizing this court to inquire into the claim of the plaintiff and make a report to the Senate of the facts and circumstances relating thereto. Accompanying the resolution was Senate Bill 1628, 77th Congress, 1st session, for the relief of S. R. Brackin. At the same time there was submitted another resolution (S. Res. 286, 76th Congress, 3rd session) transmitting a bill of a general nature (S. 963, 76th Congress, 3rd session) which covered the same subject matter.

The jurisdiction and procedure are under Section 151 of the Judicial Code (U. S. C. Title 28, Section 257). Plaintiff filed his petition within the time required by the Code.

The plaintiff seeks to recover the amount paid for tax-exemption certificates issued under the Bankhead Cotton Act (48 Stat. 598).

For the period involved the act imposed a tax at the rate of 5.45 cents per pound [1] upon the ginning of cotton from the 1935–1936 crop produced and marketed in excess of the amounts allotted by the Secretary of Agriculture. The amount of cotton exempt from tax was fixed under the terms of the act at 10,500,000 bales for the year involved.

The requirements of the law could be satisfied either by the payment of the amount of the tax or by the surrender of tax-exemption certificates which were transferable. Upon receipt of payment in cash or upon the furnishing of a tax-exemption certificate bale tags were issued. Cotton could not be moved into commerce without a bale tag affixed thereto.

If a farmer produced more than his allotted share of what it was estimated the market would absorb in any one year, this extra production was classed as surplus cotton. The farmer who produced it had a choice of three courses: (1) he could sell it in the open market, in which event he paid the tax; (2) he could purchase the tax-exemption certificates from a farmer who had not produced the amount of his quota, or from a pool of such certificates, and in this manner have his surplus portion of the commodity move immediately into commerce; or (3) he could take the surplus production home and store it on his farm or in a public warehouse without paying the tax and could include it within his quota for the following year and thus market it without tax payment.

If a farmer produced less than his market allotment he could dispose of his excess certificates in one of two ways: (1) he could surrender the excess certificates to a pool established by the Secretary of Agriculture, in which event he would participate proportionately in the net proceeds of the

[1] 50 per centum of the average price at central markets, but not less than 5 cents per pound.

sale of certificates made by the pool manager to farmers who had produced more than their allotment; or (2) with the approval of the county agent he might sell them to another farmer, if one could be found in his locality who had produced more than his allotment, in which event he received the full proceeds of the sale without any deduction for expenses. Thus whether the individual farmer voluntarily joined the pool or chose to sell his excess certificates to another farmer, in neither event did the Government have any interest in the proceeds.

The plaintiff produced cotton in excess of his allotment and on November 14, 1935, he purchased from the 1935 pool tax-exemption certificates at the rate of 4 cents per pound to cover the amount of his excess production, paying therefor by check made payable to E. L. Deal, Certificate Pool Manager. It was endorsed by him for deposit in the Treasury to the account of G. F. Allen, Chief Disbursing Officer of the Division of Disbursement, and the funds were deposited in a special trust account.

The Bankhead Cotton Act was repealed February 10, 1936 (49 Stat. 1106).

The Supreme Court has not passed directly upon the constitutionality of the Bankhead Cotton Act. True, in the case of *United States* v. *Butler*, 297 U. S. 1, the Supreme Court held that the processing tax provisions in the Agricultural Adjustment Act of 1933 were invalid. In that act (48 Stat. 31), however, the taxes were levied on the processing of the entire commodity, with a drawback on that portion which flowed into foreign markets. The resulting funds were used to make benefit payments to farmers who limited or curtailed production. Emphasis was placed on reduced production. The first powers conferred on the Secretary of Agriculture in the 1933 act were "to provide for reduction in the acreage or in the production for market or both, of any basic agricultural commodity." The court held that the processing fees were intimately linked to control of production which the court held to be a local matter and without the scope of Congressional powers.

The Bankhead Cotton Act provided for tax on the ginning of the *excess* or surplus production only. It was to be col-

lected only if the surplus was to be marketed or moved into commerce. Its first stated purpose was "to promote the orderly marketing of cotton in interstate and foreign commerce." It placed emphasis on commerce. The second Agricultural Adjustment Act, known as the Agricultural Adjustment Administration Act of 1938 (52 Stat. 31), followed largely the same pattern as the Bankhead Act. It provides penalties on the marketing of surplus production. It also emphasizes commerce.

In *United States* v. *Darby*, 312 U. S. 100, 113, it was held that the power of regulating interstate commerce extends even to the point of prohibiting it. We quote:

> While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gibbons* v. *Ogden*, 9 Wheat. 1,196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.

In the case of *Mulford* v. *Smith*, 307 U. S. 38, the Supreme Court upheld the provisions of the Agricultural Adjustment Act of 1938, which levied a penalty of 50% on the marketing of tobacco produced in excess of the quotas allotted to producers, on the ground that Congress had provided for the levy in the exercise of its power to regulate interstate commerce. The penalties levied under the provisions respecting tobacco in the Agricultural Adjustment Act of 1938 were similar to the so-called taxing provisions of the Bankhead Cotton Act. The levies in each act were authorized under the same powers and were enacted for the same purpose. In order for plaintiff to be entitled to recover from the general fund of the Treasury, as for taxes illegally assessed and collected, it would be necessary to hold the taxing provision of the Bankhead Cotton Act invalid. We are not inclined to so hold. In the light of the decision in the *Mulford* and *Darby cases*, *supra*, we do not think the plaintiff was justified in assuming that the Bankhead Act was unconstitutional.

However, it is not necessary to rest the decision on this question. Whether the act was valid or invalid, we do not

think the United States Government is legally obligated to pay to the plaintiff such sums out of the general fund of the Treasury. The plaintiff paid no tax. He simply purchased tax-exemption certificates.

Ten million five hundred thousand tax-exemption certificates were issued by the Secretary of Agriculture to cover an equal number of bales of cotton. The Commissioner of Internal Revenue collected all taxes. If anyone held an exemption certificate for a bale of cotton no tax was paid to or collected by the Commissioner on such bale. The exemption certificates were allotted to individual farmers and became the property of such farmers. They were negotiable.

The plaintiff chose to purchase these exemption certificates at 4 cents per pound rather than pay the tax of 5.45 cents per pound.

Under the terms of the act 10,500,000 bales of cotton were not taxed, and if only that number of bales had been produced and marketed in 1935 no tax would have been collected. Both the selling and the pooling of the certificates were a redistribution or a reallotment of tax-free cotton.

The records of the Department show that during the time the act was in effect $22,423,479.94 was paid for tax-exemption certificates purchased from the pool. The manager of the pool estimated that an additional $30,314,399.76 was paid locally by farmers dealing with each other, and which did not go into the funds of the pool, but was paid directly by farmers who produced more than their allotment to farmers who produced less than their allotment. $1,562,097.62 was paid in money as taxes.

If payment is to be made out of a treasury that did not benefit to purchasers from the pool there is practically the same reason for payment to farmers who dealt directly with each other. If there was compulsion in the one case there was compulsion in the other.

The sums collected on the cotton that was produced and marketed in excess of 10,500,000 bales were taxes, intended and collected as such, and as such went into the general fund of the Treasury. All these collections were returned to the taxpayers by direct appropriation. The proceeds of

the sale of the tax-exemption certificates were an entirely different fund.

The regulations [2] under which the tax-exemption certificate pool was established show that the pool was established—September 5, 1934, after the cotton picking season began—for the benefit of the producers and to prevent some of them from becoming the victims of speculators. They show conclusively that the money was not collected as taxes, but simply placed in a fund and each holder of a certificate given in exchange for surrendering his certificate to the pool an evidence that he had an undivided interest in the proceeds of the pool. The regulations stipulate that the money was to be used first for the payment of the expense of operating the pool and the balance was to be distributed share and share alike among the holders of the certificates in proportion to the number surrendered by them. The funds were established in a special account. In no other way could vouchers or warrants be issued without additional appropriative action on the part of the Congress. In fact, the regulations show the establishment of such special account.

The Government collected no tax in connection with the tax-exemption certificates. Not one penny of the amount paid into the pool went into the general fund of the Treasury of the United States. Taxes are collected by the Commissioner of Internal Revenue or under his direction. The pool funds were controlled by the Secretary of Agriculture.

The United States had no pecuniary interest in the fund as such. Its officers were merely trustees of a fund belonging to others.

It will be noted that the bill which was transmitted in connection with the resolution provides for appropriation out of the general fund of the Treasury as for a Government obligation. The petition filed by plaintiff pursues this same objective. There is no such legal obligation on the part of the United States Government.

Whether the plaintiff has any legal interest in the pool trust fund, or in the balance thereof if any part of it remains undistributed, is not before the court and is therefore not

[2] B. A. 19C, September 5, 1934.

determined. Nor does the court pass upon the question of whether any moral obligation exists.

Attention is called to the fact that a suit is pending in the United States District Court for the District of Columbia (*Thompson et al.* v. *Deal et al.*, 92 F. (2d) 478) on similar facts against the pool manager to recover from him as manager of the pool.

Attention is also called to the fact that the Congress in 1938 made provision for a refund to all those who had paid the tax in money (52 Stat. 1114). No provision was made in such measure for the use of the fund to pay those who had purchased tax-exemption certificates.

Accordingly the plaintiff's petition should be dismissed. It is so ordered.

It is further ordered that the Special Findings of Fact and Conclusion of Law and the accompanying opinion of the court be transmitted to the Senate in accordance with the Act of March 3, 1911, 36 Stat. 1087, 1138 (Sec. 151 Judicial Code; Sec. 257 Title 28 U. S. Code), amending the Act of March 3, 1887, 24 Stat. 505, 507.

Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Madden, *Judge*, concurring:

I concur in the result for the reasons which I have expressed in my concurring opinion in the *Crain and Wilson* case, No. 45300, decided this date reading as follows:

"I concur in the result reached by the Court. I would place that result upon the ground that no showing has been made to us sufficient to overcome the presumed constitutionality of the Bankhead Act. Since the invalidity of that Act is the major premise of plaintiff's claim, I think we are not faced with the question of whether or not the exaction which plaintiff seeks to recover is a tax, or whether, tax or something else, it would be recoverable if it had been illegally exacted. I would, therefore, not decide those questions."

Whitaker, *Judge*, dissenting:

I dissent for the reasons stated in my dissenting opinion in *Crain and Wilson* v. *United States*, No. 45300, this day decided (*ante*, p. 443), reading as follows:

Dissenting Opinion by Judge Whitaker

"I am unable to agree with the majority. I think the demurrer should be overruled.

"The purpose of the Bankhead Cotton Control Act was to restrict the production of cotton, not to raise revenue; but it sought to accomplish this purpose through the exercise of the taxing power. In order to restrict the production of cotton, it levied a prohibitive tax on cotton produced in excess of the farmer's quota.

"It made provision for satisfying this tax in two ways: (1) by payment of it in money; or (2) by payment of it in tax-exemption certificates, which could be purchased from a farmer who had not raised his quota, either directly or through the pool; but, whether the tax was satisfied in money or in certificates, it was liability for a tax that was discharged. Whatever it cost a taxpayer to discharge his liability for the tax, I think he is entitled to recover.

"It makes no difference that the defendant received no pecuniary benefit from the transaction. It was not looking for pecuniary benefit. It was seeking the restriction of the production of cotton. This result was accomplished. To accomplish it cost the plaintiffs the sum for which they sue. It was a sum exacted from them under the taxing power of the defendant. As Justice Sutherland said in *United States* v. *Updike*, 281 U. S. 489, 494, 'Certainly it would be hard to convince such a person that he had not paid a tax.' See also *Stahmann* v. *Vidal*, 305 U. S. 61.

"If the allegation in the petition that the Act was unconstitutional is true, I think it states a good cause of action and that the demurrer should be overruled.

"I have no doubt that it was unconstitutional under the authority of the *Butler*[1] case. Both the Bankhead Act and the first Agricultural Adjustment Act contained exactly the same vices denounced by the Supreme Court in that case.

"The Fifth Circuit Court of Appeals held the Act unconstitutional in *United States* v. *Moor*, 93 F. (2d) 422, as did also the Court of Appeals for the District of Columbia in *Thompson* v. *Deal*, 92 F. (2d) 478. In *Stahmann* v. *Vidal*, *supra*, the Supreme Court assumed, but did not decide, it to be unconstitutional.

"The taxes having been exacted under an unconstitutional statute, I think the plaintiffs are entitled to recover if the allegations of their petition are proven.

"Wherefore, I think the demurrer should be overruled."

[1] *United States* v. *Butler*, 297 U. S. 1.

MONARCH MILLS, SUCCESSORS TO MONARCH COTTON MILLS, v. THE UNITED STATES

[No. 42118. Decided April 6, 1942]

On the Proofs

Income and profits tax; power of court to review special assessment under section 210 of the Revenue Act of 1917 for incorrect taxable year.—Where the taxpayer at no time requested the Commissioner to assess its taxes for its correct taxable year, under section 210 of the Revenue Act of 1917; and where the Commissioner did not grant special assessment for the correct taxable year, which was the fiscal year; but where the taxpayer did request special assessment under said section of its profits tax liability for the incorrect period insisted upon by the Commissioner; and where the Commissioner thereupon granted such special assessment; and where a timely claim for refund was filed and denied; it is *held* that the Court of Claims has jurisdiction.

Same; right of taxpayer to make return on fiscal year basis.—Under the provisions of section 13 (a) of the Revenue Act of 1916, a corporation which operates on a fiscal year basis is entitled as of right to have its income tax computed upon this basis.

Same.—While section 13 (a) of the Revenue Act of 1916 requires the taxpayer to give notice to the collector of its fiscal year, this is not made a condition of its right to file a return on the fiscal year basis and to have its income and tax so computed, if its books were so kept.

Same.—Where it is shown that the taxpayer had kept its books and had been making its tax returns on a fiscal year basis; it is *held* that the Collector had notice that taxpayer was operating on a fiscal year basis and the provisions of the Act were accordingly complied with.

Same; computation of invested capital on return for less than twelve months; taxable year.—Where corporation's fiscal year was from October 1 to September 30, and corporation went out of business on December 31, 1917, and turned over its assets of every description to successor, which assumed all liabilities, although corporation's charter was not surrendered until later, the three-month period from October 1 to December 31, 1917, constituted a "taxable year" for the computation of income and excess profits taxes, and the invested capital should be averaged over such period.

The Reporter's statement of the case:

Mr. Howe P. Cochran for the plaintiff. *Miss Margaret F. Luers* was on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson, Fred K. Dyar, J. P. Wenchel*, and *H. S. Fessenden* were on the briefs.

The court made special findings of fact as follows, upon the evidence and the report of a commissioner, and the parties' exceptions thereto:

1. The plaintiff was incorporated in 1917 under the laws of the State of South Carolina and is the successor of Monarch Cotton Mills, which was incorporated in 1900 under the laws of the same State. The plaintiff took over the business of Monarch Cotton Mills January 1, 1918, and Monarch Cotton Mills thereupon ceased business and was dissolved on May 18, 1918.

2. Monarch Cotton Mills regularly kept its books, took its inventories, and prepared its financial statements on the basis of a fiscal year ending September 30, and since the passage of the Revenue Act of 1913 it had filed its income tax returns on the basis of a fiscal year ending September 30.

3. November 19, 1917, Monarch Cotton Mills filed with the appropriate collector of internal revenue an income-tax return for the fiscal year ending September 30, 1917, indicating a gross income of $2,062,672.48, net income of $440,126.80, and tax of $8,802.53.

4. The collector of internal revenue instructed the plaintiff on March 8, 1918, to prepare amended returns, to pay the tax assessed on the return of November 19, 1917, credit for which would be allowed in the amended returns, and to prepare and file other income and excess-profits returns covering the three-month period October 1, 1917, to the end of the year (at which time Monarch Cotton Mills was succeeded by the plaintiff) with the collector not later than April 1, 1918.

5. Pursuant to the instructions of the collector, Monarch Cotton Mills filed an amended income-tax return March 27,

1918, indicating a gross income of $2,021,617.93, a net income of $440,126.80, and an income tax (exclusive of excess-profits tax) of $17,332.89.

On the same date, March 27, 1918, Monarch Cotton Mills filed with the collector an excess-profits-tax return for the taxable year ending September 30, 1917, in which was indicated the same net income, $440,126.80, an invested capital of $1,407,557.34 at beginning of the taxable year, with no adjustment during the year, a tax of $103,854.51 for a year of 12 months, and a tax of $77,890.88 for the nine-month period beginning January 1, 1917, being nine-twelfths of that for a full year.

The total income and excess-profits taxes thus returned as assessable for the fiscal year beginning September 30, 1917, was $95,223.77.

In further compliance with the collector's instructions, Monarch Cotton Mills on March 27, 1918, filed an income-tax return for the three-month period beginning October 1, 1917, and ending December 31, 1917, indicating a gross income of $706,708.08, a net income of $182,206.00, and a net income tax of $9,108.47, exclusive of excess-profits tax.

Also on the same date, March 27, 1918, Monarch Cotton Mills filed with the collector an excess-profits-tax return for the three-month period ending December 31, 1917, indicating the same net income $182,206.00 and an invested capital of $1,683,704.44 at the beginning and throughout the taxable period, with an excess-profits tax of $30,398.23.

The total income and excess-profits taxes indicated by these returns for the three-month period was therefore $39,506.70.

Copies of these returns are filed in evidence and made a part hereof by reference.

6. The sum of $95,223.77 so indicated by Monarch Cotton Mills as payable for the fiscal year ending September 30, 1917 was assessed, $8,802.54 in 1917 and $86,421.24 in 1918, and paid, respectively, March 14, 1918 and June 14, 1918 (an excess of one cent).

The sum of $39,506.70, so indicated as payable for the three-month period ending December 31, 1917, was assessed in 1918 and paid June 14, 1918.

7. An audit was made of the taxpayer's returns for said period, and the report thereon was filed on October 19, 1922. This report computed the taxpayer's income and profits tax on the basis of its fiscal year. It indicated an invested capital as of October 1, 1916 of $1,282,514.12.

On review of this report the Commissioner changed the taxpayer's accounting period from a fiscal year basis to a calendar year basis, and asserted against the taxpayer a deficiency of $132,732.52. In the calculation of this deficiency the Commissioner corrected the net income for the fiscal year ending September 30, 1917 from $440,126.80 to $545,258.88, decided that three-fourths thereof, $408,944.16, was applicable to the calendar year 1917, corrected the net income for the three-month period ending December 31, 1917 from $182,206.00 to $259,041.08, which he added to $408,944.16, and thus made $667,985.24 as the net income for the calendar year 1917.

For the purpose of computing the excess profits tax for the calendar year 1917, the Commissioner calculated the invested capital as of January 1, 1917, in the following manner:

Book surplus Sept. 30, 1916, corrected for increase in inventory and decrease in stock in process, both Sept. 30, 1916	$533,598.86
One-fourth of corrected net income ($545,258.88) for fiscal year ending Sept. 30, 1917, allocated to calendar year 1916	136,314.72
Total	669,913.58
Less adjustments of income tax for fiscal periods ending Sept. 30, 1915, and Sept. 30, 1916, and 3 mos. ending Dec. 31, 1916	6,302.69
Surplus Dec. 31, 1916	663,610.89
Capital stock	750,000.00
Total	1,413,610.89
Less dividend paid Jan. 1, 1917	24,500.00
Invested capital for calendar year 1917	1,389,110.89

The Commissioner, with invested capital of $1,389,110.89 and net income of $667,985.24, determined the income and excess-profits taxes for the calendar year 1917 to be $264,790.15. From this result the 1917 assessments of $8,802.54, $86,421.24, and $39,506.70, total $134,730.48, diminished by a tax accrual of $2,672.84, which he had computed for the three-month period ending December 31, 1916, were, except for one cent, deducted, and the remainder, $132,732.52, represented the proposed deficiency assessment. The Commissioner notified the taxpayer of this action on January 29, 1923.

8. The above amount, $132,732.52, was assessed against the taxpayer on March 10, 1923, and notice and demand was served on it on or about March 21, 1923. Of this amount $28,766.51 was abated July 29, 1925, and the balance, $103,966.01, was paid on August 20, 1925, together with interest of $14,828.69.

Plaintiff here sues for the principal sum of $103,966.01, and interest of $14,828.69 so paid, total $118,794.70, with interest thereon, or such greater amount as it may be entitled to.

9. On or about February 11, 1924 the plaintiff received from the Commissioner of Internal Revenue notice of a jeopardy assessment with respect to taxes of Monarch Cotton Mills for the fiscal year ended September 30, 1917, and the fiscal period October 1, 1917 to December 31, 1917, and the period January 1, 1918 to September 30, 1918. In this notice he indicated an overassessment of $11,821.83 for the fiscal period ended December 31, 1917, and stated that, as to the 1917 adjustments, the notice superseded that of January 29, 1923. An additional tax was indicated for the period January 1, 1918 to September 30, 1918 of $70,416.37, making a net additional tax of $58,594.54.

In the calculation of the overassessment the Commissioner corrected the net income for the fiscal year ended September 30, 1917 from $545,258.88 to $525,626.88, by increasing the depreciation $19,632.00, decided that three-fourths thereof, $394,220.16 was applicable to the calendar year 1917, corrected the net income for the three-month

period ending December 31, 1917 from $259,041.08 to $254,133.08 by increasing the depreciation $4,908.00. He added together the two net incomes thus calculated, $394,220.16 and $254,133.08, getting $648,353.24 as net income for the calendar year 1917.

For the purpose of computing the excess-profits tax for the calendar year 1917, the Commissioner reduced invested capital for the calendar year 1917 from $1,389,110.89 to $1,384,299.13, a decrease of $4,811.76.

The difference of $4,811.76 was explained as due to additional depreciation of $4,908.00 due to increase from $1.00 per spindle to $1.25 per spindle (allowed for the period October 1, 1916 to December 31, 1916), and change in tax accrual for the same period from $2,672.84 to $2,576.60, a difference of $96.24.

With invested capital of $1,384,299.13 and net income of $648,353.24, the Commissioner determined the income and excess-profits taxes for the calendar year 1917 to be $253,064.56. At the time of this notice, on or about February 11, 1924, there had been assessed against Monarch Cotton Mills income and excess-profits taxes for the period October 1, 1916 to December 31, 1917 amounting to $267,463.00. The tax accrued October 1, 1916 to December 31, 1916 the Commissioner had computed to be $2,576.60. The Commissioner then arrived at $11,821.83 ($11,821.84) as an overassessment for the calendar year 1917.

10. On September 16, 1924 the Commissioner of Internal Revenue transmitted to plaintiff notice of a proposed certificate of overassessment of $28,766.51 for the calendar year 1917, and overassessment of $37,519.08 for the "period ended September 30, 1918," in which it was stated that the profits-tax was based upon a comparison with a group of representative concerns which in the aggregate might be said to be engaged in a trade or business like or similar to that of plaintiff.

This was followed by another letter to plaintiff March 23, 1925, from the Commissioner, as follows:

> Reference is made to your corporation income and profits tax returns for the calendar year 1917 and the period ended September 30, 1918.

You are advised that after careful consideration and review your application under the provisions of Sections 210 and 327 for assessment of your profits tax as prescribed by Sections 210 and 328 of the Revenue Acts of 1917 and 1918, respectively, has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which, in the aggregate, may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

1917

Net Income Bureau letter dated February 11, 1924 — $648, 353. 24

Computation of tax

Profits Tax Section 210		$209, 807. 11
Net Income	$648, 353. 24	
Less:		
Profits Tax	209, 807. 11	
Taxable at 2% and 4%	438, 546. 13	26, 312. 77
Total tax assessable		236, 119. 88
Previously assessed:		
Original assessment for fiscal year ended September 30, 1917, November 1917, Page 1, Line 34	$8, 802. 53	
Amended Return for fiscal year September 30, 1917, March 1918, Page 189, Line 11	$86, 421. 24	
	95, 223. 77	
Applied against three months applicable to 1916	2, 576. 60	
	92, 647. 17	
Return for period October 1, 1917, to December 31, 1917, March 1918, Page 189, Line 12	39, 506. 70	
Additional Assessment March 1923, Spec. 5, Page O, Line 8	132, 732. 52	
		$264, 886. 39
Overassessment		[1] 28, 766. 61

In accordance with the above conclusions your claims for the abatement of $132,732.52 will be rejected for $103,966.01.

[1] 10 cents error in subtraction.

Reporter's Statement of the Case

Period ended September 30, 1918

Net Income, Bureau letter dated February 11, 1924		$1,396,585.18
Computation of tax		
Profits Tax, Section 328		$864,301.53
Net Income	$1,396,585.18	
Less:		
Interest on U. S. obligations $74.62		
Profits tax 846,301.53		
Exemption 9/12 1,500.00	847,876.15	
Taxable at 12%	$548,709.03	65,845.08
Tax assessable		$930,146.61
Tax assessed, Serial No. 41268	$897,249.32	
Interest	1,114.68	
Add tax assessed, March 1924 List, Page 5, Line 9	70,416.37	
	$968,780.37	
Less: Interest	1,114.68	
Total tax assessed		$967,665.69
Overassessment		$37,519.08

In accordance with the above conclusions, your claim for the abatement of $70,416.37 and your claim for the refund of $300,000.00, aggregating $370,416.37, will be rejected for $332,897.29.

The Collector of Internal Revenue for your district will be officially notified of the rejection at the expiration of thirty days from the date of this letter.

Upon receipt of notice and demand from that official, payment should be made to his office in accordance with the conditions of his notice.

The overassessments shown above will be made the subject of Certificates of Overassessments which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281 (a) of the Revenue Act of 1924.

11. On April 2, 1925 the plaintiff transmitted a sworn letter to the Commissioner of Internal Revenue in response

to the Commissioner's letter of March 23, 1925. This letter was as follows:

> Receipt is acknowledged of your letter of March 23, 1925, bearing the above symbols and relating to our income and profits tax returns for 1917 and period ended September 30, 1918.
>
> The assessment under the relief provisions of the Revenue Acts of 1917 and 1918 is not contested, but we wish to protest and appeal the rate allowed for the period ended September 30, 1918. We feel that this percentage, as determined under Section 328, is too high and it appears that the proper comparatives were not used in the determination of this tax liability.
>
> Therefore it is requested that a further review be made of this case as soon as possible in order that our correct tax liability may be finally determined. A conference is requested for the purpose of taking up the matter in detail.

12. On July 14, 1925 the Commissioner issued and delivered to plaintiff Certificate of Overassessment No. 518356, certifying to an overassessment of $28,766.61 "for the year 1917," detailed therein as follows:

Tax assessed:	
Original assessment return for fiscal year September 30, 1917, November 1917, page 1, line 34	$8,802.53
Amended return for fiscal year ended September 30, 1917, March 1918, page 189, line 11	86,421.24
	95,223.77
Applied against 3 months applicable to 1916	$2,576.60
	92,647.17
Return for period October 1, 1917, to December 31, 1917, March 1918, page 189, line 12	39,506.70
Additional assessment March 1923, Special 5, page 0, line 8	132,732.52
Total tax assessed	264,886.39
Total tax assessable	236,119.88
Overassessment	[1] 28,766.61

[1] 10 cents error in subtraction.

And in this certificate the overassessment was indicated as to be abated. The certificate concluded: "In Bureau letter of recent date you were advised of the amount and manner of establishing your correct tax liability under the provisions of Section 210 of the Revenue Act of 1917 which resulted in the above overassessment."

13. On February 17, 1926 the plaintiff filed a claim for refund of $250,000, which claim was rejected by the Commissioner April 27, 1927. This claim was set forth as for the period January 1, 1917 to December 31, 1917, and stated that claims for refund were being prepared in detail on the following bases: adjustment of fair market value as of March 1, 1913; adjustment of depreciation; loss of useful value; obsolescence; restoration of invested capital; consideration under special assessment; and other discrepancies in the return.

14. On March 28, 1927 the plaintiff filed a claim for refund of $103,966.01, which claim was rejected August 8, 1928. This claim was also stated as for the calendar year 1917 and on the following ground:

> The above amount was assessed on the March 1923 assessment list and paid by us on August 15, 1925. At the time of payment, the collection of this tax and interest was barred by the Statute of Limitations, since more than five years had elapsed from the filing of the return. Since the tax was barred, the entire amount was erroneously and illegally collected. Therefore, under the decision of February 21, 1927, of the U. S. Supreme Court we are entitled to have this amount, plus interest, refunded to us and demand is accordingly hereby made.

15. On April 25, 1929 the plaintiff filed suit against John F. Jones, Collector of Internal Revenue for the District of South Carolina, in the District Court of the United States for the Western District of South Carolina. In its complaint the plaintiff alleged certain errors on the part of the Commissioner of Internal Revenue, (1) in redetermining the taxes of Monarch Cotton Mills on the basis of the calendar year 1917, instead of on the basis of its fiscal year ending

September 30, 1917, and the three-month period ending December 31, 1917; (2) in assessing and collecting the taxes more than five years after the filing of the returns; and (3) in failing to restore to and allow in invested capital for the three-month period ending December 31, 1917 the full invested capital of the taxpayer. On joinder of issue the case was tried, and decided adversely to the plaintiff August 17, 1931. The opinion of the Court is published at 56 Fed. (2d) 180. Copies of the complaint and answer thereto are filed in evidence and made part hereof by reference.

16. On August 15, 1929 the plaintiff filed with the collector a claim for refund of $236,119.88 for the period January 1, 1917 to December 31, 1917. The grounds for refund of this amount were stated in the claim as follows:

> 1. A large part of this tax was collected after the period during which collection could legally have been made had expired. The returns showing the entire income for the calendar year 1917 were filed on, to wit, March 25, 1918. An amount of $103,966.01 and interest was collected on, to wit, August 15, 1925. The collection was illegal, and the money should be refunded.
>
> 2. This tax, as for a calendar year 1917, was collected without any assessment and after the statutory period during which assessment could legally have been made had expired.
>
> 3. The filing of this claim shall not be considered an admission by the claimant that its taxes should be computed on the calendar-year basis for 1917.
>
> 4. Water power paid in for stock has not been included in invested capital. Detailed brief relative to this water power will be filed.
>
> 5. The taxpayer is entitled to further relief under the provisions of Section 210 of the Revenue Act of 1917 for the reason, among others, that its invested capital cannot be satisfactorily determined and proper comparatives were not used in the previous determination.
>
> Taxpayer reserves the right to amend and/or add to this claim. Oral hearing is requested.

On the same date, August 15, 1929, the plaintiff filed with the collector a claim for refund of $143,472.71 for the

period from September 30, 1917 to December 31, 1917, stating the grounds for refund as follows:

> 1. This tax was collected after the statutory period during which assessment and/or collection could legally have been made had expired and the money should be refunded.
>
> 2. This tax was for a three months period beginning Oct. 1, 1917, and ending December 31, 1917. The capital for that period should not have been reduced to one-quarter to cover a three months period, it should have been allowed as for a full year—the exemption for that period should not have been reduced to one-quarter to cover a three months period, it should have been allowed as for a full year.
>
> 3. This was the tax of another corporation, the Monarch Cotton Mills, and was collected from us illegally.
>
> 4. The return of the Monarch Cotton Mills was filed on, to wit, November 17, 1917. The tax was illegally assessed on or about April 15, 1923. The tax was collected on, to wit, August 15, 1925, which is after the period during which collection could legally have been made had expired.
>
> 5. Water power paid in for stock was not included in invested capital. Detailed brief relative to water power will be filed.
>
> Taxpayer reserves the right to amend and/or add to this claim. Oral hearing is requested.

On or about August 15, 1929 the plaintiff filed other claims for refund of the same sum, that is to say, $143,472.71, which substantially duplicated the claim above set forth.

On September 26, 1932 the Commissioner of Internal Revenue denied all these claims, together with others not in evidence, by notice as follows:

> Your claims for refund, two for $236,119.88, three for $143,472.71, one for $97,682.15, and one for $55,469.43 income and profits tax for the taxable year 1917 have been examined and will be rejected for the following reason:
>
> The case of Monarch Mills as successors to Monarch Cotton Mills for the year 1917 has been closed by court decisions. Accordingly, the Bureau is precluded from reconsidering this case by the doctrine of res adjudicata.
>
> A copy of this letter has been mailed to Mr. Howe P. Cochran, Washington, D. C., in accordance with the

authorization contained in your power of attorney running to him which is on file in this office.

In accordance with section 1103 (a) of the Revenue Act of 1932, official notice of the disallowance of your claims will be issued by registered mail.

This was followed October 18, 1932 by the "official notice" referred to.

The court decided that the plaintiff was entitled to recover.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff is the successor of the Monarch Cotton Mills. It succeeded to all the assets and assumed all the liabilities of the latter on January 1, 1918.

The Monarch Cotton Mills regularly kept its books on the basis of a fiscal year beginning October 1 and ending September 30 of the succeeding year; it made its financial statements on this basis, and since the passage of the first income tax Act it had filed its income tax returns to the Federal Government on this basis. However, the Commissioner of Internal Revenue in auditing its returns for the fiscal year October 1, 1916 to September 30, 1917 and for the three-months period from October 1, 1917 to December 31, 1917 disregarded the fiscal year and assessed a tax based on the calendar year. It is alleged that this resulted in an over-assessment.

Section 13 (a) of the Revenue Act of 1916 (39 Stat. 756, 770) provides:

> The tax shall be computed upon the net income, as thus ascertained, received within each preceding calendar year ending December thirty-first: *Provided*, That any corporation * * * may designate the last day of any month in the year as the day of the closing of its fiscal year and shall be entitled to have the tax payable by it computed upon the basis of the net income ascertained as herein provided * * *; and it shall give notice of the day it has thus designated as the closing of its fiscal year to the collector of the district in which its principal business office is located * * *.

Where a corporation operates on a fiscal year basis, it "shall be entitled to have the tax payable by it computed upon" this basis. Section 206 of the Revenue Act of October 3, 1917 (40 Stat. 300, 305), is to the same effect. This was not a privilege the Commissioner could grant or withhold; it was a privilege to which the corporation was entitled as of right.

It is true the section requires the taxpayer to give notice to the collector of its fiscal year, but this is not made a condition of its right to file a return on this basis and have its income and tax so computed, if its books were so kept. But, whether or not this is so, the facts nevertheless show that this taxpayer kept its books and had been making its tax returns on a fiscal year basis and, therefore, the collector already had notice that it was operating on a fiscal year basis and had designated September 30 as the last day of its fiscal year. The provisions of the act were therefore complied with.

It was, accordingly, unlawful for the Commissioner of Internal Revenue to assess taxes against this taxpayer on any basis other than on the basis of its fiscal year. Any overassessment resulting from an assessment on any other basis the plaintiff is entitled to recover, unless the defendant is right in its contention that we have no jurisdiction of this case because the assessment as finally made was under section 210 of the Revenue Act of 1917.

In order to decide this question a brief summary of the facts is necessary.

Within the time allowed by law the taxpayer filed income and profits tax returns for its fiscal year ending September 30, 1917. On December 31, 1917 it sold all its assets to the plaintiff and went out of business. Plaintiff then inquired of the Collector of Internal Revenue whether or not it should make returns on behalf of its predecessor for the remaining three months of the year 1917, and upon being advised by the collector that it should, it did so, sometime in the early part of the year 1918.

Subsequently, a revenue agent made an examination of the taxpayer's books and filed his report on October 19, 1922. In this report the taxpayer's income and invested

capital were computed on the basis of its fiscal year, and taxes for the period October 1, 1916 to September 30, 1917, and from October 1, 1917 to December 31, 1917 were computed accordingly. However, the Commissioner of Internal Revenue, for some unknown reason and contrary to the statute, determined that the taxes should not be so computed, but should be computed for the period January 1, 1917 to December 31, 1917. Plaintiff was notified of his computation on this basis by letter dated January 29, 1923. It appeared from this letter that the Commissioner had taken one-fourth of the taxpayer's income for the fiscal year ending September 30, 1917, and applied that to the calendar year 1916, so as to put the corporation on a calendar year basis for 1916, and he had taken three-fourths of the income for the fiscal year ending September 30, 1917 and applied that to the calendar year 1917. To this he added the income for the last three months of 1917 so as to get the corporation on a calendar year basis for 1917. He then proceeded to compute the income and profits taxes on the aggregate income thus arrived at.

This was a purely arbitrary and unwarranted allocation of income and capital. Protest was made against this by the taxpayer, who insisted that the income and invested capital could and should be computed on the fiscal year basis, but, on February 11, 1924, the Commissioner reaffirmed the calendar year basis of computation.

In both the letter of January 29, 1923 and that of February 11, 1924 the Commissioner, following the same unauthorized and arbitrary method, computed the taxpayer's invested capital as of December 31, 1916. The letter of January 29, 1923 showed that invested capital to be $1,389,110.89, and the letter of February 11, 1924 showed it to be $1,384,299.13. The Revenue Agent's report showed invested capital at the beginning of the fiscal year, October 1, 1916, to be $1,282,514.12.

After receipt of the letter of February 11, 1924, in which the Commissioner insisted upon computing the tax on the calendar year basis, the taxpayer apparently asked the Commissioner to assess the tax so computed under the provisions

of section 210 of the Revenue Act of 1917, providing for an assessment in the way therein laid down in a case where "the Secretary of the Treasury is unable * * * satisfactorily to determine the invested capital."

The record compels the conclusion that the reason the taxpayer finally asked for consideration under section 210 was solely because of the situation produced by the refusal of the Commissioner to follow the statute by computing the taxes on the taxpayer's accounting period. The Commissioner granted the taxpayer's application and, persisting in his course of computing the tax on a calendar year basis, he assessed taxes computed under section 210 of the Act at a sum of $28,766.51 less than the sum previously assessed.

Upon receipt of this letter the taxpayer wrote the Commissioner that assessment under this section "is not contested," but it claimed the tax assessed was excessive because, it alleged, the Commissioner did not use the proper comparatives. This protest, however, was denied and the taxes were assessed in accordance with the Commissioner's letter of March 23, 1925.

It should be said further that in 1929 the taxpayer filed a claim for refund in which it stated that it was entitled to further relief under section 210 because "its invested capital cannot be satisfactorily determined and proper comparatives were not used in the previous determination." This had reference, of course, to its invested capital for the calendar year 1917; the taxpayer never at any time said that its invested capital could not satisfactorily be determined if the basis of the fiscal year was used. Neither it nor the Revenue Agent had experienced any difficulty in doing so. The taxpayer never claimed assessment under section 210 if the fiscal year basis was used.

But the defendant says that under numerous decisions of the Supreme Court, this court, and other courts, we have no jurisdiction of this case because the assessment was under the relief provision of 1917. We would agree with this position if the taxpayer had requested assessment under section 210 for its correct taxable year, and if the Commissioner had granted special assessment for its correct taxable year;

but this taxpayer neither requested special assessment for its proper taxable year, to wit, its fiscal year, nor did the Commissioner grant special assessment for the fiscal year. What the taxpayer did request, as a last resort, and what the Commissioner granted, was special assessment for a false taxable year and upon an income and capital arbitrarily computed therefor.

The taxpayer had insisted from the beginning that its taxes had been assessed on the wrong basis, and that this had resulted in a greater assessment than it owed, and it had undertaken to induce the Commissioner to assess it on the proper basis, insisting always that its income and invested capital could be clearly computed; but the Commissioner would not do so. As a last resort, the taxpayer said to the Commissioner, if you will not assess our taxes on the proper basis, then we ask you to consider our profits tax liability for the false period adopted by you under section 210. But the taxpayer at no time has requested the Commissioner to assess its taxes for its true taxable year under section 210; it never has said that its invested capital for its actual and correct taxable year could not satisfactorily be determined.

The Revenue Act of 1917 furnished no warrant for the action of the Commissioner in assessing the taxes on the basis of the calendar year, and this unlawful act of the Commissioner drove the taxpayer into requesting special assessment. The necessity for requesting special assessment and the ground upon which it was requested were not the result of the condition set out in the Act, to wit, that the Secretary of the Treasury could not satisfactorily determine the invested capital, but was the result of the wrongful action of the Commissioner in assessing the taxes on a calendar year basis, instead of on the taxpayer's fiscal year. The taxpayer, therefore, is not bound by the Commissioner's action and is not precluded from maintaining this suit by reason of a special assessment made outside the framework of the statute. The record shows that the income and capital for the correct taxable year can be determined.

This is in no way inconsistent with the cases cited in the defendant's brief, or with any other decision of the Supreme Court, or of any other court, so far as we are advised. In none of the cases cited were the taxes assessed on the basis of a false and arbitrary fiscal year. In *Cuban-American Sugar Company* v. *United States*, 89 C. Cls. 215 (27 F. Supp. 307; 309 U. S. 681) arising under the 1917 Act, and in *Michigan Iron & Land Co.* v. *United States*, 81 C. Cls. 330, 10 F. Supp. 563, and in other cases arising under the 1918 Act, we held that, since the taxpayer had requested and insisted upon assessment under the relief sections, it could not complain because its request had been granted. In the case at bar, however, as we have pointed out above, the taxpayer has never requested special assessment of taxes computed on its true accounting period. It requested special assessment for the false period adopted by the Commissioner, and not for its true period. This does not preclude it from bringing suit here for refund of any amount exacted over the amount due computed under section 207 for its accounting period as fixed by the Act.

The defendant next contends that in computing invested capital for the period beginning October 1, 1917 we should take the average invested capital, not only for the three months of 1917 during which plaintiff's predecessor was in business, but also the nine additional months necessary to make up a twelve-month period, and average the invested capital over the full twelve months; or, if wrong in this, that at least it should be averaged over the period from October 1, 1917 until the date it surrendered its charter on May 18, 1918. We are of the opinion that the invested capital of plaintiff's predecessor should be averaged over the three months' period of 1917 during which it was in business. It went out of business on December 31, 1917, and turned over to the plaintiff all of its assets of every description and was relieved by the plaintiff of all of its liabilities. Although its charter was not surrendered until later, it had ceased all operations and never intended to resume them. Under the authorities, the three months' period is to be considered a taxable year and the profits tax

computed accordingly. *Richard A. Strong, et al.* v. *United States*, 62 C. Cls. 67; *Lowell & Andover Railroad Co.* v. *Commissioner*, 8 B. T. A. 501; *United States* v. *Carrol Chain Co.*, 8 F. (2d) 529; *Pennsylvania Chocolate Co.* v. *Lewellyn*, 27 F. (2d) 762, 764.

We desire to call attention to a matter of practice arising in this case. The defendant has filed two specific exceptions to the commissioner's findings, but, in addition, it says the commissioner's findings are not sufficiently comprehensive and, therefore, asks that its own statement of facts be adopted, without specifically pointing out wherein the commissioner's findings are insufficient. Such an exception does not comply with our rules and has not been considered.

The entry of judgment will be deferred until the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report by a commissioner as to the correct amount due plaintiff computed in accordance with this opinion. It is so ordered.

JONES, *Judge;* and LITTLETON, *Judge*, concur.

MADDEN, *Judge*, dissenting:

I do not agree with the decision of the majority.

In January 1923 the Commissioner of Internal Revenue assessed plaintiff's profit taxes on a calendar year basis, plaintiff having made its return on a fiscal year basis. I assume, as the majority has found, that his doing so was erroneous and that he should, upon request, have corrected the error. So far as the record shows, he was never requested to correct the error, at least until 1929. In the meantime, plaintiff had, at some time prior to March 1925, requested the Commissioner to assess its profits taxes for 1917 under the provisions of Section 210 of the Revenue Act of 1917. This the Commissioner had done, but plaintiff complained of the result, on the ground that the percentage rate used was too high and the proper comparatives were not used. The Commissioner, in response to this complaint, reduced the assessment. In 1926 and 1927 plaintiff filed claims for refund setting forth grounds not includ-

ing the one asserted in this suit. As I have said, not until 1929 did it assert that basis of claim.

The majority opinion recognizes that, ordinarily, an application by a taxpayer for assessment under Section 210 precludes him from obtaining a review by a court of the Commissioner's assessment made pursuant to that application. But it finds that plaintiff only made its application because of the refusal of the Commissioner to correct his error of assessing plaintiff on a calendar year basis. So far as the record shows, plaintiff never even asked the Commissioner to correct his error before applying for assessment under Section 210. I think plaintiff's application should be treated as its voluntary, deliberate act, which it should not now be permitted to repudiate in order to assert a basis of claim as to which it was silent during all the time that the defendant's agents had plaintiff's affairs under active consideration.

WHALEY, *Chief Justice*, dissenting:

I dissent from the decision of the majority of the court on the ground that this court does not have jurisdiction to review a special assessment determination of the Commissioner. That has been the consistent rule followed by the Supreme Court in all cases which have come before it for consideration. *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; and *Welch* v. *Obispo Oil Co.*, 301 U. S. 190. In these cases the Supreme Court has pointed out that "in this delicate and complex phase of revenue administration" it is beyond the power of the courts to inquire into and disturb these acts of the Commissioner which Congress vested in an administrative agency as the final authority. The decisions of this court have been to the same effect. *Central Iron & Steel Co.* v. *United States*, 79 C. Cls. 56; *Bradford & Co.* v. *United States*, 79 C. Cls. 89; *Michigan Iron & Land Co.* v. *United States*, 81 C. Cls. 330; and *Cuban-American Sugar Co.* v. *United States*, 89 C. Cls. 215.

The reason given by the majority for this unusual and exceptional departure from the rule so long established and so consistently followed is that unlawful and wrongful acts

drove the taxpayer to request special assessment and that it was not done voluntarily. In my view the facts are to the contrary. A controversy arose between the Commissioner and plaintiff over whether plaintiff's tax liability for 1917 should be determined on the calendar or fiscal-year basis under the provisions of Section 13 (a) of the Revenue Act of 1916, which was the governing act. Plaintiff filed its returns on the fiscal-year basis, whereas the Commissioner held that since appropriate notice had not been given it should be held to a calendar-year basis. The Commissioner accordingly determined plaintiff's tax liability for the year 1917 on the latter basis. The facts found by the court show no protest against the annual basis when that final determination was made. What they show is that after the determination plaintiff requested special assessment and, since the determination had been made on the calendar-year basis, the request certainly must have been for a special assessment determination on a calendar-year basis. The Commissioner acceded to plaintiff's request, granted special assessment, and made his determination accordingly. When that determination was made, plaintiff advised the Commissioner of its satisfaction with the Commissioner's determination in these words:

> The assessment under the relief provisions of the Revenue Acts of 1917 and 1918 is not contested, but we wish to protest and appeal the rate allowed for the period ended September 30, 1918.

We have in these facts not only a request for special assessment by plaintiff, but an acceptance of the results reached for 1917, the year before the court, and only an objection to the comparatives used by the Commissioner for the nine months of 1918. The nine months' period of 1918 is not before the court.

In addition, between 1925 and 1929 plaintiff filed two claims for refund, both for the calendar-year 1917 and in neither of these claims was any protest made against the Commissioner's final determination on a calendar-year basis. It was not until April 25, 1929, that we have formal notifica-

tion from plaintiff of its dissatisfaction with the annual basis of the Commissioner's determination. At that time suit was brought in the Federal district court for the Western District of South Carolina for the recovery of taxes for the year now before this court, and one of the grounds assigned was that the taxes should have been determined on a fiscal rather than on a calendar-year basis. In deciding that case adversely to plaintiff, the learned Judge Watkins held not only that plaintiff had not properly put the Commissioner on notice of its intention of raising the issue of the accounting basis but also that—

> Even if this question could now be raised, it could not avail in this case for the reason that I am unable to find where the corporations subject to this tax had proceeded to acquire any absolute or certain right to have their returns made and audited upon a fiscal year basis. As above stated, the testimony indicates that, because of the custom previously established, it would have been fair to permit this to be done. I fail to find, however, that any previous application was made to or consent given by the Commissioner for a fiscal year accounting during 1917. [56 Fed. (2d) 180, 183, 184.]

Under such a state of facts, how it could be said there was any compulsion or arbitrary act on the part of the Commissioner in bringing about the special assessment determination passes my comprehension. In my opinion, the request was made by plaintiff in the ordinary way. Plaintiff accepted that determination and should not now be permitted to repudiate those acts. That it may have chosen unwisely in 1925 in seeking relief from the Commissioner's determination under a remedial statute, in which the results turned out differently from what it expected, is not something into which we can inquire at this time. The die was cast when the request was voluntarily made. Certainly more compelling circumstances than have been shown should be presented in order to justify a departure from a rule so well established and a judgment of such magnitude at this late date. In my opinion, the petition should be dismissed for lack of jurisdiction.

In the above case (No. 42118) the following order was issued, November 16, 1942:

ORDER

This case comes before the court on defendant's motion for judgment; and it appearing that on April 6, 1942, the court filed special findings of fact with an opinion holding that plaintiff was entitled to recover, but suspended the entry of judgment to await the filing of a stipulation by the parties showing the amount due plaintiff under the court's decision; and it further appearing that on October 6, 1942, plaintiff filed a motion to dismiss the petition herein, stating that "the plaintiff has been paid"; which motion was allowed November 2, 1942, and the petition dismissed; and it further appearing that on November 13, 1942, the defendant filed a motion for judgment, signed on behalf of the plaintiff by Howe P. Cochran and on behalf of the defendant by Assistant Attorney General Samuel O. Clark, Jr., in which it is stated that: "In conformity with the direction of the court, the parties reached an accord that the refundable overpayment of income tax due plaintiff for 1917 was $65,000, and that interest thereon had accumulated prior to October 1, 1942, in an amount of $35,000," and that "Inasmuch as both parties waived any right to seek review of the decision of the Court, or the amount of the refund, Treasury check No. 1500139, in the amount of $100,000 in full satisfaction of plaintiff's claim was issued September 29, 1942"; and it further appearing from the defendant's said motion that the claim herein has been paid by Treasury check No. 1500139 issued to plaintiff on September 29, 1942, for the sum of $100,000, being $65,000 principal and $35,000 as interest accumulated thereon prior to October 1, 1942—now, therefore,

It is ordered this 16th day of November 1942, that an entry be made on the docket of this case that (in the absence of the filing in this court of a stipulation by the parties showing the amount due plaintiff or the filing by either party of a motion for the entry of judgment) "the claim

herein having been settled by agreement of the parties and paid by Treasury warrant No. 1500139 for $100,000, as above stated, the defendant's motion for judgment is overruled."

By the Court.

RICHARD S. WHALEY,
Chief Justice.

ALEX RANIERI v. THE UNITED STATES

[No. 42851. Decided February 2, 1942. Plaintiff's motion for new trial overruled June 1, 1942]*

On the Proofs

Government contract; Mississippi River levee; misrepresentation as to conditions not established.—Where plaintiff entered into a contract with the Government for the construction of a levee on the Mississippi river; and where it is established by the evidence adduced that the conditions encountered by plaintiff in the prosecution of the work were not unusual; and where it is further established that there was no misrepresentation as to said conditions by the Government; it is *held* that the defendant was not responsible for the delay in completing said work, that plaintiff is not entitled to recover and that defendant is entitled to recover on its counterclaim against plaintiff.

The Reporter's statement of the case:

Mr. S. Wallace Dempsey for the plaintiff. *Mr. Bruce Fuller* was on the briefs.

Mr. W. A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This is a suit brought by a contractor to recover for losses incurred on a contract for construction of the Chamberlain-Lobdell levee on the Mississippi River, involving approximately 2,950,000 cubic yards of earth, at 12.40 cents per cubic yard. The contract was to be completed in 450 calendar days from date of receipt of notice to proceed. The contractor, in-

*Plaintiff's petition for writ of certiorari denied by the Supreme Court, December 14, 1942.

experienced in such work, encountered difficulties from which delays resulted, and the contractor eventually discontinued operations. The contract was later terminated by the contracting officer and the work was completed by another contractor after submission of bids, at a cost to the Government of $108,995.71 in excess of the amount which would have been due to the plaintiff had the work been completed, on time, in accordance with the original contract. There was due to plaintiff the sum of $71,342.51, for work performed, when the contract was terminated, which he did not receive, and on the Government's counterclaim the court awarded a judgment against the plaintiff for the net excess cost of $37,653.20. It was held that there was no misrepresentation as to conditions by the Government and the plaintiff was not entitled to recover.

The court made special findings of fact as follows:

1. Plaintiff and defendant entered into a contract October 12, 1931, numbered W 1096 eng. 1929, whereby, for a consideration of 12.40 cents per cubic yard, place measurement, the plaintiff agreed to "furnish all labor and materials, and perform all work required for the construction of Item R 831, Chamberlain-Lobdell Levee, Lots A, B, C, & D, containing approximately two million nine hundred fifty thousand (2,950,000) yards, situated in the Atchafalaya Front Levee District," in accordance with specifications, schedules, and drawings, all made a part of the contract and designated "Engineer Department, U. S. Army, Standard Specifications for Levee Work, No. 32.38, dated August 25, 1931, and drawing entitled Item R 831, Chamberlain-Lobdell Levee, File No. L–8–2268."

Under the contract the work on each of the four lots was to commence within 20 calendar days after the respective dates of receipt of notice to proceed thereon and be completed within 450 calendar days from the date of receipt of such notice.

About 2,000 linear feet out of 20,000 feet of an old levee were made available by the contract for the new levee construction and the remainder of the material was to be obtained from riverside borrow pits.

The specifications stated that the soil conditions indicated a B Section was required throughout.

Paragraph 19 of the specifications described a B Section as having a crown of 10 feet, a riverside slope of 1 on 3½, the landside slope as containing a seepage line of 1 on 6½, and the governing material as loam.

Copy of the contract, the specifications and drawing is in evidence and made part hereof by reference.

The plaintiff had had no experience in building levees.

Prior to bidding, representatives of the plaintiff visited and inspected the site of the proposed levee.

2. The levee to be constructed extended from station 3273+04 to station 3493+20, a distance of about 22,000 feet. Borings had been taken over the site of the proposed levee at intervals of 1,000 feet, each to a depth of about 25 feet, and a chart of these borings appeared on the contract map. Plaintiff had been furnished the contract map and specifications before submitting his bid. This chart classified the earth disclosed by the borings as sandy loam, sandy clay, sand and loam, clay, loam, sand and silt, clay and silt, brown clay, soft brown clay and sand, soft blue clay, hard blue clay, and lastly soft brown clay, and indicated the several depths and locations at which these various classes had been found in the hole bored.

The average depth of loam or sandy loam disclosed by these borings was about 6 feet, the maximum depth was 16 feet and the minimum depth 1 foot, a mean depth of 8½ feet.

There was sufficient satisfactory material in the borrow pits and in the available sections of the old levee from which to construct a B Section, and the new levee was eventually successfully constructed from such sources with a B Section.

There is no evidence that the borings were inaccurately charted.

3. On October 30, 1931, the plaintiff received notice to proceed with the work. This fixed the date for completion as on or before January 22, 1933. He commenced in contract time with preparatory work such as clearing, grubbing, and plowing, which required about one week's time.

Plaintiff began the placing of material in the levee on Lot A February 10, 1932; on Lot B June 14, 1932; on Lot D August 23, 1932; and on Lot C September 30, 1932, 103, 228, 298, and 366 days, respectively, after receipt of notice to proceed.

4. Plaintiff sublet a part of the work as of September 19, 1932, to Robinson & Young, a co-partnership, being certain work on Lots C and D, and as of September 26, 1932, to M. W. O'Meara, being certain other work on Lots C and D.

5. In the course of the work the Government inspectors on the job served current notices upon the plaintiff warning him of departures he was making from contract requirements. The instances of such violations, as communicated to plaintiff from time to time, were as follows:

	Number of instances
Borrow pits:	
Overdug (Par. 25)	23
Embankment:	
Not started full out to slope stakes (Par. 22–a)	16
Water impounded between partial fills (Par. 33)	24
Wet material (Par. 22–a)	40
Material showing tendency to slough (Par. 22–a.)	67
Grade deficient (Construction notes)	3
Surface of incomplete levee not thoroughly broken and turned to depth of 6 inches (Par. 22–a)	2
Foundation:	
Not properly prepared (Par. 20)	6
Wet base (Par. 33)	41
Water on berm (Par. 33)	4
Inspection ditch excessive in width and depth (Par. 20)	5
Total	231

Of the total instances as to which warnings were issued 102 related to Lot A, 46 to Lot B, 32 to Lot C, and 51 to Lot D.

Included in these notices was one dated March 1, 1932, warning that material placed in the embankment showed a tendency to slough. The plaintiff took exception to this criticism March 7, 1932, in the following letter to the contracting officer:

> As you know we are having our first experience on building levees. We proposed when we came into this business to do our work just as well as possible and live

> up to all reasonable requirements of the inspector and engineer in charge.
>
> On the morning of March 1, the inspector Mr. Laforber gave us a ticket for placing wet dirt in the levee. We wish to say that the dirt placed in the levee was not wet. This dirt had been dug several weeks ago and drainage had been maintained ever since. In fact the dirt was so dry that one could walk on it without soiling anything but the soles of his shoes.
>
> We would like to call your attention to the fact that we are dropping from ten to twelve yards at a time and this may cause a slight settlement of the dirt already dry upon which it falls. But that does not justify any reasonable man of intimating or writing something which is false.

There is no proof that the plaintiff at any time otherwise contested the inaccuracy of these notices.

During the progress of the work the contracting officer, finding that the plaintiff was violating various provisions of the specifications in the construction of the levee, or engaging in harmful practices, communicated such findings to the plaintiff, directed him to correct the conditions complained of, and warned him that he would be held responsible for resulting damage to the levee. The subject matter of the contracting officer's notifications and their dates are as follows:

Feb. 16, 1932: Water on berm.
Mar. 2, 1932: Water impounded between partial fills.
Apr. 15, 1932: Embankment not started full out to slope stakes.
June 18, 1932: Excessive gross grade.
June 20, 1932: Embankment not started full out to slope stakes.
July 20, 1932: Machine working on incomplete embankment.
Oct. 8, 1932: Slide due to wet material.
Oct. 18, 1932: Slide due to wet material.
Oct. 28, 1932: Overdug borrow pits.
Nov. 26, 1932: Slide due to sloughing material.
Nov. 29, 1932: Slide due to wet material and method of construction.
Dec. 12, 1932: (1) Slide due to wet material and method of construction.
Dec. 12, 1932: (2) Slide due to wet material and method of construction.
Dec. 14, 1932: Placing material with tendency to slough.

On September 15, 1932, the contracting officer notified the plaintiff in writing that the progress of the work was unsatisfactory and demanded the use of additional equipment,

and again communicated with plaintiff October 14, 1932, by letter as follows:

> A review of the progress of construction on Chamberlain-Lobdell Levee discloses that none of the embankment in Lots A and B has been completed to the grade and section required under the contract. All of the equipment on Lot A between the dates of August 10, 1932, and October 1, 1932, has been engaged in cutting out the numerous slides which occurred in the partially completed embankment. During the thirty-day period prior to August 10, 1932, there was placed, in the embankment comprising Lot "A", slightly less than 9,500 cubic yards of material.
>
> Work on Lot "B" began about April 25, 1932. Numerous difficulties with your equipment due to breakdowns, and many days of delay due to lack of proper drainage, arose during the course of construction, and slides, dues to your faulty methods of construction, have developed which further delay completion. Up to October 1, 1932, none of the embankment was completed to the grade and section required under the contract. The lot is only 50% completed and 75% of the time allowed for its completion has already elapsed.
>
> Due to unsound construction methods adopted by yourselves, the embankment as presently installed in Lots "A" and "B" is not considered entirely satisfactory for completion. The unsound construction methods referred to included operations which provided for handling and rehandling of material several times before its final placement; construction of partial fills on slopes steeper than provided for in the contract specifications: introduction of pockets and valleys into the work between partial fills, which provided excellent basins for collecting and impounding rainfall and moisture seepage from the fills; construction of embankment to heights in excess of gross grade thereby providing conditions conducive to (1) slides, because slopes are necessarily steeper than provided for in the contract specifications, and (2) foundation failures due to the excess weight imposed by the added load; installation of a dragline machine atop partially completed embankment, producing excessive vibration and also adding excess weight to be borne by the foundation area; lack of proper drainage for the successful execution of the work; overdigging of borrow pits and

excavation of inspection ditch to dimensions greater than specified, all of which are in the nature of violations of contract specifications or contrary to sound construction practice.

It is the opinion of this office that additional difficulties will probably ensue when completion of the presently installed partial fill is attempted. The doubtful nature of the work already done by you prohibits additional partial payments on work to be done on Lots "A" and "B". You are therefore advised that no further partial payments will be made for incompleted embankment in these two items. Payment for completed embankment will be made as provided for in paragraph 9 of the contract specifications.

I am in receipt of your letter dated September 24, 1932, in which you list certain equipment which was proposed to be placed in operation on your work at once. This list included one Monighan 6 W Dragline, and three small draglines to be used in conjunction with tractor and wagon hauling units. It is noted that the small draglines and the tractor and wagon units were placed in operation on Lot "C" between the dates September 26 and September 29, 1932. However, the Monighan 6 W dragline has not yet been placed in operation.

Again, on October 2, 1932, you wrote to this office, through Mr. Edgar S. Maupin, Area Engineer, stating that a Monighan 6 W dragline machine would be on the site of the work immediately. This machine has not yet been placed in operation, nor is it yet on the site of the work.

It is desired to inform you that in order to complete Lot "A" within the time fixed for completion, it will be necessary to install additional equipment capable of handling at least 2,000 cubic yards per day. The equipment presently engaged on this lot is estimated to have a capacity of approximately 3,000 cubic yards per day. As there remains only about 70 effective working days of the 100 remaining calendar days in which to place the remaining 315,000 cubic yards in this lot, the necessity for requiring additional plant is apparent. It is desired to have this additional plant on the site of operation and in working condition without undue loss of time. You are requested to inform me concerning plans for installation of this additional equipment as soon as practicable after receipt of this letter.

At no time did the plaintiff appeal to the Secretary of War from any decision of the contracting officer.

6. The plaintiff, on or about December 12, 1932, ceased work on the project, and on that date sent the following communication to the contracting officer:

> Careful investigations and extensive explorations of the conditions at the site have disclosed the fact that the subsurface and/or latent conditions differ materially from the conditions as represented in the plans and specifications, and you are hereby formally notified that I elect to rescind my contract with full reservations of all my rights in the premises.
>
> However, if mutually satisfactory adjustments can be made, I am willing to proceed with the work and to that end I hold myself in readiness to discuss this matter with you at any time within the next forty-eight hours.
>
> Kindly acknowledge receipt of this letter, and oblige,

The contracting officer replied December 14, 1932, denying the right of plaintiff to rescind the contract, and demanding resumption of operations. Operations were not resumed. The contracting officer on January 3, 1933, transmitted the following letter to the plaintiff:

> Reference is made to Contract W1096eng–1929, entered into by you on October 12, 1931, for furnishing all labor and materials and performing all work required for the construction of Item R 831, Chamberlain-Lobdell Levee, Lots A, B, C, and D in the Atchafalaya Front Levee District, containing approximately two million nine hundred fifty thousand (2,950,000) cubic yards.
>
> Article 1 of said contract provides that the work shall be completed within the time fixed for completion in paragraph 39 of the specifications made a part of the contract. Paragraph 39 of the specifications provides as follows:
>
> "*Time:* Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed."
>
> Notice to proceed under the contract was received by you on October 30, 1931, thus fixing the date for completion as January 22, 1933. To present date 430 calendar days have elapsed since the beginning of the

> contract period and less than forty-five percent of the required earthwork has been constructed. Due to your failure to prosecute the work with such diligence as to insure its completion within the contract period, your right to proceed with the work is hereby terminated under the provisions of Article 9 of the contract.

On December 12, 1932, the plaintiff had done about 45 percent of the required work, and had exhausted about 91 percent of the contract time.

7. There is an absence of proof that defendant's officers at any time misrepresented conditions to the plaintiff, either orally or in writing, or in particular through the plans or specifications.

Plaintiff could have satisfactorily completed the work with the material available and in the agreed time. His failure to do so was due to his own fault and negligence, to delay on his part in getting started in the actual handling of levee material, to his violation of the terms of the contract, and unsound practices in the handling of material. These unsound practices and contract violations related mainly to the handling and disposition of material when wet and tending to slough or slide, and the impounding of water in partial fills.

8. The work remaining to be done was relet by due advertisement and bid to other contractors, who successfully completed plaintiff's work. The actual cost to the defendant of the work remaining to be done, including administrative costs and correction of plaintiff's work, such as cutting out and replacing slides, was $319,876.31, which was a fair and reasonable amount.

Had the plaintiff completed the work remaining to be done, the cost thereof to the defendant would have been $210,880.60.

The excess in cost is $108,995.71. At the time of plaintiff's default he had earned, in addition to moneys already paid him, $71,342.51, which he has never received.

The net excess cost to the United States of completing plaintiff's contract, on account of his failure to complete the contract, is $37,653.20.

The court decided that the plaintiff was not entitled to recover, and that the defendant was entitled to recover on its counterclaim.

JONES, *Judge*, delivered the opinion of the court:

On October 12, 1931, plaintiff contracted with the defendant to construct certain levees on the lower Mississippi River containing approximately 2,950,000 cubic yards of earth. The particular project was known as Item R 831, Chamberlain-Lobdell Levee, Lots A, B, C, and D. The consideration was to be 12.40 cents per cubic yard. The work was to begin on each of the four lots within 20 calendar days after receipt of notice to proceed. Completion was to be within 450 calendar days from the date of such notice.

According to the contract and specifications the material for building such levees was to be obtained from an old levee and borrow pits located on the right-of-way. The type of material to be selected from these sources was set out in the specifications.

On October 30, 1931, plaintiff received notice to proceed, and the date for completion was therefore fixed as not later than January 22, 1933.

Plaintiff was hopelessly inexperienced in the building of levees. Most of his construction experience had been in the city of Chicago and he had never done any levee construction work.

A machinery salesman by the name of Maxson talked with Mr. Ranieri and went down to visit the area where the levee was to be constructed. He was accompanied by a Mr. Dee, who was a representative of the plaintiff, and also by a Mr. Derock. Maxson made some estimates and plans of operation, and together with Derock furnished Dee some figures. Upon these figures Dee made some calculations. All three looked over the site. The plaintiff used this information, plan of operations, and the calculations in making his bid. Maxson then sold him such new and second-hand machinery as was thought to be necessary in order for plaintiff to do the essential construction work.

Plaintiff's unfamiliarity with both this section of the country and the character of work he had contracted to do soon became evident. While he commenced within a week with some preparatory work such as clearing, grubbing, and plowing which required about two weeks' time, he did not begin placing the material in the levee on Lot A until about 103 days after receipt of notice to proceed; on Lot B, 228 days after such receipt; on Lot D, 298 days after receipt of notice, and on Lot C, 336 days after such receipt.

Plaintiff ran into many difficulties in handling the soil from the borrow pits, encountering cypress stumps and other organic matter, which caused damage to his machinery. He also had difficulty with sloughs and slides. There was also much rainfall. These conditions, however, were not shown to be unusual in that section.

Many times during the course of the work the Government inspectors served notices upon plaintiff warning him of departures he was making from contract requirements. Such notices were given in 231 instances, as set out in Finding 5.

On December 12, 1932, plaintiff ceased work on the project, complaining that subsurface and latent conditions differed materially from the conditions as represented in the plans and specifications, and gave formal notice that he elected to rescind the contract, indicating, however, that if adjustments could be made he would be willing to proceed. The contracting officer replied on December 14, 1932, denying the right of the plaintiff to rescind the contract and demanding the resumption of operations. Operations, however, were not resumed, and on January 3, 1933, the contracting officer sent plaintiff a letter stating that 430 of the 450 calendar days allowed for the completion of the contract had elapsed, and that less than 45% of the required earthwork had been constructed, and notifying him that his right to proceed with the work had been terminated. The defendant chose to relet the work to be done and it was let to other contractors who completed the construction of the levee.

The excess cost of completing the work over the amount specified in the original contract, after allowing credit for sums which plaintiff had earned in addition to the money which had been paid him prior to default was $37,653.20.

Plaintiff sues for various items set out in his petition aggregating a total of $258,880.49, which he asserts he is entitled to recover.

Defendant pleads that plaintiff is not entitled to recover any sum, and that defendant is entitled to judgment on its counterclaim in the sum of $37,653.20.

Plaintiff bases his claim in the main on the alleged failure of the defendant to furnish the plaintiff the type of soil in the borrow pits which was suitable for the building of such a levee, and upon its failure to disclose to him the nature of the soil, the type of outside material, including cypress stumps, found in some of the borrow pits, as well as the excess moisture found in the soil.

Plaintiff's first point is that defendant agreed to furnish plaintiff, without cost, clean earth, free from foreign material, which would not slough or show a tendency to slough. He cites Sections 13 and 22 (a) of the specifications. His reliance on these two provisions discloses that plaintiff wholly misinterpreted their meaning. Section 13 does provide that the defendant will furnish the right-of-way and earth for construcing the levee, but 22 (a) clearly places the obligation upon the contractor to select from the borrow pits the type of earth suited for the levees and as called for in the specifications. The plaintiff makes the same character of mistake in interpreting Section 19 of the specifications. He construes this section as a warranty on the part of the defendant that the material contained in the borrow pits was loam, whereas the specifications merely require that a B Section be constructed of loam, which of course was to be selected by the plaintiff from the material in the borrow pits.

The evidence shows that there was sufficient material for this purpose, which conclusion is further strengthened by the fact that the later contractor completed the work in a satisfactory manner with materials drawn from these same borrow pits.

Plaintiff's second point that none of the material in the borrow pits was suited to the construction of a B Section levee is not borne out by the facts as disclosed by the evidence. Plaintiff actually built some of the embankment not only to the prescribed grade but higher than the grade specified.

Plaintiff also emphasizes the fact that insufficient borings were taken and that these do not properly disclose the character of the soil which was actually found when the work began. Nowhere, however, does plaintiff contend that the charts of the borings show anything different from the true facts as disclosed by such borings. Only one boring was made for each thousand feet. There was no obligation on the part of the defendant to make any borings. However, there was an obligation on its part, if it did make borings, to fully disclose such facts as were found. This it did.

The chart classified the earth as disclosed by the borings as sandy loam, sandy clay, sand and loam, clay, loam, sand and silt, clay and silt, brown clay, soft brown clay and sand, soft blue clay, hard blue clay, and soft brown clay. The borrow pits contained sufficient of the type of material called for in the specifications for plaintiff to have constructed the levee in accordance with the contract.

The evidence rather clearly shows that the conditions found could not be called unusual. Any sort of investigation by the plaintiff, as disclosed by the various witnesses who testified, would have shown him that he would probably encounter wet soil; that it is not unusual to encounter cypress stumps; that water and such stumps are frequently found in that section, especially where there is an extra heavy growth of sugar cane, as in the instant case. The evidence further shows that defendant made no misrepresentation; that it withheld no information; that it accurately reported the borings, and that therefore the plaintiff was not misled in any way by representations of the Government.[1]

Looking over the entire record it appears to be a clear case of a man's undertaking a large and responsible contract for a type of construction for which he was not equipped either by training or experience, in a section of the country where soil and water conditions were entirely different from those to which he had been accustomed, and where the methods of work required and conditions likely to be encountered were wholly unfamiliar to him.

[1] *Trimount Dredging Co.* v. *United States*, 80 C. Cls. 559; *James Stewart & Co., Inc.*, v. *United States*, 94 C. Cls. 95.

It is unfortunate, but the plaintiff duly signed the contract, which was awarded on his own bid, and voluntarily undertook its obligations. In view of the facts and circumstances as disclosed by the record we know of no way that he may avoid the legal consequences of his act.

Plaintiff is not entitled to recover against the defendant, and defendant is entitled to recover a judgment against the plaintiff on its counterclaim in the sum of $37,653.20.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

PERRY McGLONE v. THE UNITED STATES

[No. 43828. Decided April 6, 1942. Plaintiff's motion for new trial overruled October 5, 1942]

On the Proofs

Government contract; construction of road in Hot Springs National Park.—Where plaintiff by contract with the Government undertook to build 3.528 miles of road in Hot Springs National Park in Arkansas, to furnish all labor and materials and to perform all work in grading and surfacing said road in accordance with drawings and specifications; and where plaintiff alleges breach of contract by defendant, uncompensated changes in construction requirements, damages for delay and unpaid balance; it is *held* that considerable extra work was done but the evidence is conflicting and certain of the claims are indefinite.

Same; failure of plaintiff to establish rights.—Where it is indicated by the evidence that certain excavation work done by plaintiff was worth more than the compensation paid; and where plaintiff did not pursue the method plainly laid down in the contract to establish whatever rights he may have had; it is *held* that plaintiff is not entitled to recover additional compensation for this work.

Same.—Where due to alignment and other changes by the defendant, the plaintiff excavated 4,010 cubic yards of rock more than would have been required by the original contract plans; and where such a change was authorized by the terms of the contract; and where plaintiff was paid therefor at the rate

stipulated in the contract for cuts and fills, regardless of classification; and where no other price was agreed upon and plaintiff did not protect his rights by pursuing the method set out in the contract; it is *held* that plaintiff is not entitled to recover any additional amount for this work.

Same; material taken from borrow pit with approval of defendant's representative.—Where the lot upon which the borrow pit was located was purchased and paid for by the plaintiff with the approval of the District Engineer, defendant's authorized representative, who had declined pursuant to the contract to permit plaintiff to secure material from any point within the Government park; and where after completion of the work defendant decided that it had not been necessary to take any material from the borrow pit and refused payment therefor; it is *held* that plaintiff is entitled to recover the price specified in the contract for material taken from said borrow pit.

Same; liquidated damages wrongfully deducted.—Where the defendant, in making payment to plaintiff, deducted liquidated damages at the rate of $40 per day for 58 days, delay; and where it is not possible from the evidence to apportion the number of days of delay for which the respective parties were responsible; it is *held* that liquidated damages should not have been deducted and the plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Clifford B. Kimberly for the plaintiff. *Mr. J. L. Milligan* was on the briefs.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On March 15, 1935, plaintiff and defendant entered into a contract whereby plaintiff undertook to furnish all labor and materials, and perform all work required for 3.528 miles of grading, crushed-stone surfacing, and bituminous surface treatment in Hot Springs National Park, Garland County, Arkansas, in accordance with designated specifications, schedules, and drawings.

The United States was represented by Oscar L. Chapman, Assistant Secretary of the Interior, as contracting officer.

The contractor was to do the work at unit prices named in his bid. Including general excavation there were 35 items on which unit prices were stated and they are set forth in plaintiff's Exhibit No. 3, which is made a part of these findings by reference. Quantities were stated as approximate.

The work was to be commenced within ten days after date of receipt of notice to proceed and was to be completed within 225 calendar days from that date.

Notice to proceed was received by the contractor April 10, 1935, thus fixing the time for completion as not later than November 21, 1935.

Copy of the contract and specifications is in evidence and made part of these findings by reference.

The evidence does not disclose that the contracting officer himself exercised any contractual authority beyond signing the contract. The contract designated the "Chief of Bureau [of Public Roads], Chief Engineer, and engineer" as authorized representatives of the contracting officer. The contract defined the "engineer" as the "District Engineer of the Bureau of Public Roads of the United States Department of Agriculture in whose district the proposed improvement is to be located."

Contractual authority herein on the job was exercised by the district engineer acting through local engineers at Hot Springs National Park. The local engineers had charge of the work and plaintiff's working contact was with them. They are referred to in these findings as the "Engineer." Orders to the contractor were given by the local engineers and decisions on the contract work were rendered to the contractor in their name.

2. The project was known and officially designated as "Project 1 A 1," and the road was located on West Mountain in the national park. The job was advertised and in January 1935 bids were received. They exceeded the estimate made by the Engineer and were all rejected. The defendant then removed from the proposed specifications some restrictions on the use of dynamite and the project was readvertised February 5, 1935.

The second set of bids was opened March 7, 1935. Plaintiff was found to be the lowest bidder and was awarded the contract.

Plaintiff had bid on both advertisements.

Prior to the first bidding his representative had, in company with the Engineer, gone over the route of the proposed roadway.

After rejection of the first bids and before the second bidding both plaintiff and his representative visited the site of the work, and, since the cost of excavation varies for earth, shale, loose rock, and solid rock, made their own estimates of the quantities of each as they observed them. At the time they made this inspection they had in their hands or available to them the contract plans and specifications. With this information before him plaintiff made his second bid, which was substantially lower than the first one.

The project consisted of a roadway around the mountain in the form of an elongated major bend, known as the "Main Line," about 2.1 miles long, and within this main bend was a smaller bend, about 1.4 miles long, known as the "Spur Line," diverging from the Main Line and having a loop or turn-around at its undetached end. The comparatively sharp curve in the major elongated bend, midway between its termini, was commonly known as the "Sheep's Nose." Various points in the roadway were given station numbers, indicating the progression in linear feet, there being 100 feet between consecutive station numbers, the Sheep's Nose including Stations 34 to 49, Main Line.

Sheet No. 5 of the contract plans, which covered Stations 34 to 51, Main Line, bore the notation:

> Note:
> Between Sta. 34 and Sta. 49 the alignment is subject to change during construction.

The cover to these plans was inscribed:

> Detailed Cross Sections.
> Sheets showing detail cross sections form a part of the drawings for this project, though not furnished herewith. They are available for inspection at the offices issuing these plans.

The plans were prepared by the Bureau of Public Roads, Department of Agriculture, were issued by that bureau at Hot Springs, Arkansas, and were there available to bidders.

The Main Line was in effect the relocation of an existing road.

Before excavation cross sections were surveyed and charted at numerous points along the projected route at right angles to the alignment or course of the road. These cross sections as plotted were designed to show the preconstruction contour of the ground surface. Above or beneath that ground line, as the case might be, was then superimposed the contour line of the planned road in cross section. If above the ground line, the superimposed line indicated a fill; if below, a cut.

The contour line of the planned road in cross section was possible of close approximation to the line controlling construction. The ground line existing before construction, being irregular, could not be exactly plotted without unreasonable expenditure of time and money, and was only fairly reproduced on paper. It consisted of a series of straight lines connecting surveyed points.

Given the areas of the cross section as end areas and the length between such planes, the cubic yards in the section thus inclosed could be estimated for pay purposes, and this method was adopted by the parties to this contract. It was prescribed by Specifications for Forest Road Construction, Form F. R. 50, 1932 Revision, made a part of the contract, issued by the Department of Agriculture Bureau of Public Roads, in words as follows (page 15):

> *Method of Measurement.*—Yardage to be paid for shall be the yardage measured in original position by the method of average end areas, of material acceptably excavated as hereinabove prescribed. The measurement shall include over-breakage of slides in common or unclassified excavation, not attributable to carelessness of the contractor, and authorized excavation of solid rock below grade, also of soft and spongy spots below grade. The measurement shall also include unavoidable overbreakage in solid rock to an amount not to exceed in any half-station of 50 feet, 10 percent of the actual quantity

required for the same half-station within the lines shown on the plans.

3. Plaintiff began operations in due time, first with preparatory work incident to a construction job, such as building a field office, entering into subcontracts, assembling equipment and materials, organizing his force.

The contractor required the setting of stakes before he could make cuts and fills. It was the duty of defendant's surveyors to stake the job for structure, inlets, drains, pipes, cuts, and fills.

The roadway was first staked for rough grading and the center line thereof was indicated by stakes set off from the roadway so marked that the center line could be located by lines projected from the stakes. Stakes so set were known as offset center line stakes and were situated where their destruction or displacement would be unlikely. The stakes set for elevation were governed by bench marks. Curves in the alignment were altered by the defendant's surveyors during the progress of the work, but the changes in the system of curvatures had to do largely with refinements and did not appreciably affect the volume or character of the work. Along the curves the surface of the road was banked, that is to say, inclined transversely from the horizontal. The stakes determined gradient as well as elevation.

4. Offset center line stakes were available to the contractor at all times. He experienced a slight initial delay due to the Government's failure to set stakes for the pipes promptly. Stakes for the pipes were necessary in the beginning because the pipe had to be laid before the road above it could be constructed. This delay had no effect on the final completion date of the work.

The plaintiff, with the assent of the Engineer, set some of the grade stakes himself, getting the information for that purpose from the plans, and he also set some of the slope stakes.

5. During the course of the work the actual alignment of the road was shifted from one side to the other of the alignment as indicated in the contract plans. This shifting was not done under any change order, but through the setting

of stakes, through correction of surveys, through consummation of the change noted on the contract plans between Stations 34 and 49. The actual revision in contract plans changed the alignment Station 34+88 through to Station 71+79 so that the changed line did not tie in with the original planned line at Station 49. This change ran through a rock area. The line was shortened 92 feet by the change. The maximum throw between Stations 49 and 71+79 was 15 feet to one side. The line as built tied in with the originally planned line at Stations 34+88 and 71+79.

There were other changes in alignment from the contract plans, the net effect of which, as to increase or decrease of excavation, is not satisfactorily proved.

The changes in alignment by the defendant did have the effect of delaying construction, but to what extent is indeterminable.

6. Between Stations 8+50 and 12+64 Main Line plaintiff was required to excavate and did excavate 375 cubic yards of rock for a ditch not shown on the original contract plans.

At the direction of defendant the plaintiff excavated 576 cubic yards of rock at picnic grounds and parking areas not shown on the original plans.

Due to alignment and other changes by the defendant, including that between Stations 34 and 49 Main Line, the plaintiff excavated 4,010 cubic yards of rock more than would have been required by the original contract plans.

The original contract plans stated that between Stations 34 and 49 on the Main Line the alignment was subject to change during construction (See Finding No. 2). The original contract plans specified no other changes in alignment, and such other changes were authorized to be made only under the general clause of the contract, Article 3, permitting the contracting officer to make changes in drawings and specifications within the general scope of the contract, by an order in writing subject to the approval of the head of the department, where the estimated amount of the change was more than $500.00. After the contract was entered into the plans were so changed that the alignment from Station 34+88 was shifted clear through to Station 71+79 and did

not tie in with or join the originally planned line at Station 49, which a change merely from Stations 34 to 49 would have required it to do (See Finding No. 4).

This quantity, 4,010 cubic yards, presupposes that the failure to tie in at Station 49 Main Line constituted a change in the contract plans.

Additional subgrade excavation claimed by the plaintiff is not satisfactorily proved.

The total of 5,069 cubic yards of additional rock excavation was paid for by the defendant at the rate of 70 cents per cubic yard, being the contract rate for general excavation, regardless of classification, amounting to $3,548.30. The fair and reasonable cost of excavating this rock was $2.00 per cubic yard, or a total for 5,069 cubic yards of $10,138.00, a difference of $6,589.70.

7. Stakes for rough grading were set to guide the contractor in his cuts and fills. Thereafter a Government survey party set other stakes, indicating the precise surface of the road. Rough grading was below the final surface of the road, for the reception of the roadbed. The second set of stakes was known as finishing stakes and were the final stakes as far as alignment, gradient, and elevation were concerned.

At Station 25 on the Spur Line there was a major discrepancy in the setting of stakes by the defendant's surveyors or stakes set under their supervision. The plaintiff had excavated in rock to the first line so set, by which rough grading was to be governed, and was required to rough grade again at that location to make the road conform to the final set, the finishing stakes. This required additional excavation by the plaintiff in rock, and the finishing stakes set the road some five feet deeper into the mountain at that point. The length of the additional cut was about 500 feet.

At Station 52 on the Main Line another major discrepancy between rough grading and finishing stakes occurred, due to an erroneous Government survey. The contractor correctly followed the rough grading stakes and was thereafter required to rough grade again in order to conform to the finishing stakes. This discrepancy extended half a mile

more or less with a variation in throw, the maximum being four or five feet deeper into the mountain. This stretch consisted partly of shale and partly of easily excavated earth.

There were other discrepancies between the rough grading and the stakes set for finishing. It is not clear to what extent these other discrepancies were chargeable to the defendant.

By September 15, 1935, the contractor had finished his original rough grading. Thereafter additional rough grading was done by him, due to the discrepancies mentioned. Final rough grading was completed by the contractor about December 1, 1935.

By reason of having to conform the rough grading to finishing stakes that did not agree with the rough grading stakes, the plaintiff was materially delayed by the defendant in the completion of the work, a more exact fixing of the extent of delay not being determinable from the record, and the amount of loss or damage suffered by the plaintiff, by reason of the delay, is not proved.

8. The contract provided:

> When excavated * * * material is hauled as directed more than 1,000 feet, overhaul will be allowed on such material. The overhaul distance will be the distance between the centers of volume of the material in its original position and after placing, less 1,000 feet. This distance shall be measured along the shortest practicable route. The number of station yards of overhaul shall be the product of the volume of the overhauled material, measured in its original position, in cubic yards, by the overhaul distance in feet, divided by 100.

The agreed price for overhaul was one cent per station yard.

The method of calculating station yards of overhaul prescribed by the specifications results in rough approximation only. Three widely varying estimates were made by the Government's officers, one in the field, one in the office as basis of payment, and one at the trial, and two different estimates at variance with all others were made by plaintiff's

expert witness at the trial. In view of all the evidence the court finds that a fair and reasonable estimate of the station yards of overhaul moved by the contractor was 1,000,000 station yards. At one cent per station yard, the contract price therefor was $10,000. The plaintiff has been paid $7,346.74 only, for 734,674 station yards, an underpayment of $2,653.26.

9. The plaintiff did certain blasting for excavation between Stations 35 and 40 on the Main Line. In staking for such operations plaintiff's surveyor had in his hands plans that had been discarded by the Government for other plans, such other plans having been duly given to the plaintiff. Blasting was done according to the superseded plans before the error was discovered by plaintiff's engineer-in-charge. This resulted in wasted blasting and was in no way the fault of defendant's officers.

10. The contract plans list 15 retaining walls on Main Line and Spur, with an aggregate length of 3,822 feet, an average length of 254.8 feet, the greatest length shown being 670, and the least length 70 feet. The plans show also the typical design and elevation of these retaining walls.

The unit bid and accepted price for unclassified excavation for structures was $1.50 per cubic yard and for banded cement rubble masonry, Type B, $10.00 per cubic yard.

Soon after appearing for the work plaintiff was required to and did build a sample wall for inspection.

Before plaintiff bid on the job his representative, on tour of the site, was told by defendant's inspector that a retaining wall was contemplated at about Station 44 on the Main Line from five to eight feet above the ground level, and that a number of retaining walls shown on the plans would be eliminated. The plans did not indicate a retaining wall would be required at Station 44, Main Line.

The wall at Station 44 was the only retaining wall built on the project. It is referred to in the testimony and in these findings as the "Big Wall." The location of this wall was staked by defendant's surveyors April 19, 1935, and in constructing it plaintiff followed the special plan given him. Above the ground level the wall was given fixed dimensions, but inasmuch as it was designed with a batter

it increased in size as it went downward into the ground to the foundation. The contractor was ordered from time to time to keep on digging until he struck a foundation satisfactory to defendant's engineers. This required repeated widening of the trench, since a satisfactory depth had not been predetermined. Under these circumstances hand labor was employed, increasing the expense of excavation over what it would have been if the depth had been anticipated.

The depth of the trench dug for the wall was about 18 feet, and this required successive hand-over-hand lifting of earth by excavators with shovels on scaffolding. The trench was 21 or 22 feet wide and about 165 feet in length, and took about three months to excavate. The wall itself was about 33 feet high from the foundation, 18 feet wide at the foundation, about 3 feet wide at the top, and 161 feet long.

During the course of work on the wall plaintiff's superintendent stated to the Engineer that such work would delay plaintiff and on completion thereof told him that such delay had actually been experienced.

When it was finally apparent what the dimensions of the wall would be the Engineer suggested to plaintiff's superintendent that it might be built of concrete with stone facing instead of wholly of stone. This was satisfactory to the plaintiff and without a formal change order it was agreed that the change would be made, and it was made and the wall constructed of concrete with a facing of banded cement-rubber masonry. With reference to construction this was a different type of wall than called for under the specifications.

With regard to the suggested change the plaintiff, after reciting the difficulties attending the construction of the wall, stated in a letter to the Engineer on or about June 22, 1935:

> In view of these facts we are herewith respectfully submitting a proposal to build this wall of concrete, with weathered stone facing, giving the same effect but much greater strength. We propose to build this wall at same unit price as masonry wall.
>
> Another factor entering into this from our viewpoint is the time element. As you know it has been raining constantly and while we have been able to keep going

> in a way with shovel outfit, it has been impossible to do much on this wall. Therefore it looks like this wall might shut us down unless we can do something to speed it up.
>
> There is no question but what this change will cost us money but in view of the time element and the added strength we will gain, we are willing to stand this additional cost.

As to the retaining walls the plans provided: "At least 50% of all exposed masonry shall be weathered surface."

At the instance of the Government's landscape architect the Engineer, without formal change order, required plaintiff to make the exposed masonry of the wall entirely of weathered surface. This entailed extra expense and labor upon plaintiff's part in searching for and transporting weathered stone, over and above what the expense would have been had weathered stone been limited to 50% of the surface.

The wall itself was completed on or about September 17, 1935.

The separate cost of obtaining stone with weathered surface in order to effect a completely weathered surface for the Big Wall is not proved.

11. Much of the road had to be excavated through rock. This required drilling by jackhammer and air compressor ahead of the shovel for blasting operations, a comparatively slow and tedious operation. Plaintiff planned to do this work at night as well as by day in order to keep the shovel provided with loosened rock. In the forepart of May 1935, the plaintiff had drilled one night and on the following night was stopped in so doing by the Engineer who gave as his reason therefor that night drilling was disturbing the people of Hot Springs. Thereafter plaintiff was not permitted to drill at night.

Plaintiff endeavored to make up for lost time by putting on an extra compressor and jackhammers.

Plaintiff was put to extra expense to make up for the period of time lost by the stop order. The reasonable cost to plaintiff for use of the extra compressor and jackhammers was $285.00 per month for a period of four months, or $1,140.00.

This order delayed the work, but to what extent is not apparent from the record.

12. Location of the drainage structures and the stakes therefor was an early necessity of the job. Defendant's surveyors began setting the stakes for these structures April 20, 1935, and from that date set no further stakes for drainage structures until May 8, 1935, when such work was resumed for three days. Such stakes were again set May 20, 1935, and thereafter at irregular intervals until they were all set. The pipes in the drainage structures were in instances relocated, due to the peculiarities of local contours, and in instances were extended to accommodate them to shoulders and slopes.

Plaintiff's first compressor and set of jackhammers arrived at the site April 29, 1935, and were set to work the next day. Plaintiff's shovel arrived at the site May 1, 1935, and was started on excavation May 7, 1935.

No delay due to failure of defendant to furnish stakes for drainage structures was proved.

Plaintiff began clearing and grubbing April 22, 1935, and there is no evidence that the work of clearing and grubbing was delayed by lack of stakes therefor.

Center line alignment stakes for the road itself were being set as early as the first of April 1935, two weeks before the contractor arrived on the job, and plaintiff was at no time without a substantial amount of work ready for him to do, without the necessity of setting center stakes.

This was not always true as to grade stakes, however. After June 15, 1935, on request that he be permitted to do so, the contractor set up grade stakes for slopes himself, getting the necessary information for that purpose from the plans. This he did with a view to expediting his work.

On August 9, 1935, the plaintiff directed the attention of the Engineer to a number of instances where stakes had not yet been furnished, stating:

> Unless we receive some of these stakes on pipes and other small odd jobs it is going to become necessary to lay off a number of our laborers.

The stakes requested were furnished and there was no complaint.

13. The movement of plaintiff's shovel depended upon the progress made by drilling in front of it, and by progress of the work at Station 44 on the Main Line, known as the "Big Fill," where the Big Wall was located. The Big Fill was for the purpose of crossing a ravine which divided the work into two sections. To get from one section to the other plaintiff had to build a road across the ravine for his shovel.

On May 29, 1935, plaintiff was forced to cease digging at Station 7+00 on the Spur Line because material there excavated was being used to make the fill at Station 44, Main Line, and no more fill could be made because of the danger to men excavating for the retaining wall. Otherwise plaintiff could have continued at that point on the Spur Line.

On June 27, 1935, plaintiff had to move his shovel from Station 13+00 on the Spur Line because the fill at Station 44 on the Main Line again was not available, due to construction of the retaining wall.

July 14, 1935, the shovel again moved, because drilling operations immediately ahead were not sufficiently advanced. In addition, a pipe had been ordered out by the Engineer and the drilling for the time being could not progress.

On August 1, 1935, plaintiff again spent time moving his shovel because of an error in staking for a pipe.

On August 12, 1935, plaintiff again moved his shovel, due to the necessity of using the material at the Big Fill, which was waiting upon the completion of the Big Wall.

There were other moves made by the shovel, from one point to another, without at the time working in the intervening stretch. These other jumps have no apparent connection with any act or acts of the Government, other than normal operations.

The time consumed in each move was at least five hours, and because of the moves plaintiff was delayed in the progress of his work.

Plaintiff did not keep an accurate record by which the cost due to the time lost on shovel moves can be ascertained. The cost in idle labor was not less than $4.50 per hour.

14. Plaintiff found it necessary to secure material for his fills from a place other than a cut.

This source was known as a "borrow pit," and the material obtained therefrom "borrow." As to borrow the specifications provided:

> *Description.*—This item shall consist of excavating and disposing, as directed, of satisfactory material obtained from borrow pits designated, staked, and measured by the engineer. Borrow shall be used when sufficient quantities of suitable materials are not available from the roadway and drainage excavation to properly form the embankments, subgrade and shoulders, and to complete the backfilling of structures.
>
> Selected material for adjusting the roadbed grade, completing embankments, backfilling subgraded rock cuts, and placing cushion material on rock embankments if not obtainable from roadway cuts shall be obtained from sources designated by the engineer, but his authority must be obtained before any borrow pit is opened.

The specifications also provided:

> Borrow pits must not be visible from the completed road if they are located off the cleared right-of-way.

The Engineer would not permit plaintiff to secure borrow material from inside the national park and plaintiff had to look elsewhere.

Plaintiff purchased a building lot outside the park, near the entrance thereto, for the purpose of using it as a borrow pit, paying therefor $300.00, which represented its fair value. This lot was later transferred to the Government, and, pursuant to the terms of a special act (49 Stat. 1516), became and now is a part of the Hot Springs National Park.

Selection of the borrow pit was approved by the Engineer. Certain conditions were imposed upon the plaintiff by the Engineer in return for permission to take borrow from the

lot, and these conditions were communicated to the plaintiff by the Engineer August 3, 1935, in a letter as follows:

> I have your communication of July 30 relative to borrow on Lot 5, Block 187, adjacent to the above project.
>
> Relative thereto, after discussing the proposition with Mr. Thomas J. Allen, Superintendent of Hot Springs National Park, it was decided that we will permit borrow to be taken from this lot for use on West Mountain under the following conditions:
>
> 1st: Borrow may be taken from the Gem Street side of the lot, the excavation to be started at such point on Gem Street so that the borrow pit will be as fully concealed as possible from any point on Brook Street. At no place on the lot shall the excavation be carried beyond the natural ridge between Gem Street and Brook Street.
>
> 2nd: Clearing for the borrow pit shall be on the Gem Street side of the lot and shall not extend beyond the natural ridge between Gem Street and Brook Street. Clearing shall not be done on Gem Street at the point of the lot between Gem and Brook Streets, nor extend along Gem Street within 125 feet of Brook Street.
>
> 3rd: The property shall be deeded to the United States Government with clear deed and abstract prior to starting work on the borrow pit.
>
> After deeding of the lot, while it becomes the property of the Government, it is not a part of the Hot Springs National Park and overhaul on the material from this borrow pit will not [be] paid.

In September of 1935 there was due the plaintiff $17,760.72 on estimates prepared by the defendant. The plaintiff not yet having deeded the lot to the United States, the Engineer refused to pass the estimates for payment until such deed was delivered to him. The plaintiff thereupon prepared and delivered the deed so demanded and eventually otherwise complied with the conditions imposed in the letter of August 3, 1935.

In order to ascertain the amount of material taken from the borrow pit defendant's surveyors made contour and cross section surveys before and after material had been removed by the plaintiff. The material removed from the

borrow pit was used by the plaintiff in embankments, shoulders, or other fills.

Excavation from the borrow pit was used for a time by the Engineer in calculating estimates for progress payments on the job. In making final estimates, however, on which the last payments were made, the Engineer calculated that the plaintiff could have made all fills to the contract limits from cuts without the use of any borrow and allowed plaintiff nothing for the material secured from the borrow pit.

In the advertisement, on which plaintiff bid, the defendant had estimated there would be approximately 13,400 cubic yards of unclassified excavation for borrow, and plaintiff's bid thereon of 75 cents per cubic yard, totalling $10,050.00, was accepted.

There were 6,585 cubic yards of material actually used from the borrow pit. The price therefor, at a rate of 75 cents per cubic yard, would be $4,938.75.

The specifications provided:

> All surplus excavation and waste material shall be used to widen embankments uniformly or to flatten slopes, or shall be deposited in such other places and for such purposes as the engineer may direct. In no case shall material be deposited above the grade of the adjacent roadway unless directed in writing by the engineer. The contractor shall not borrow and waste without written application to and written consent from the engineer. Under no circumstances shall he be paid for excavation beyond the established line of the roadway prism, or for borrow, when such excavation or borrow results from the method of borrow and waste, nor for overhaul not actually required by the design. The work described under this item will not be measured or paid for directly. It shall be considered a necessary part of the work paid for under the contract prices bid for unclassified excavation, solid rock excavation, common excavation, or excavation for structures, as the case may be.

15. For unclassified excavation for structures, on which defendant in its advertisement had estimated 2,750 cubic yards and plaintiff had bid $1.50 per cubic yard, total

$4,125.00, the defendant finally estimated and paid for 6,878 cubic yards, at $1.50, $10,317.00.

There was a total excavation for structures of 7,251 cubic yards, which at the rate of $1.50 amounts to $10,876.50, and there is due plaintiff on this item $559.50.

16. (1) Between Stations 8 to 12 on the Main Line, after the road there had been built, plaintiff was ordered to dig a ditch and waste the material therefrom into ravines and conceal it by a covering of leaves. Plaintiff had to dispose of the material by hand shovel and wheelbarrow. For the excavation plaintiff was paid as for unclassified excavation. For disposing of it afterwards as specially directed there was no further payment. There were about 500 cubic yards of material so wasted. The material did not, when disposed of, constitute part of the road.

(2) At the junction of the Spur Line and the Main Line, at Station 1 on the Spur Line, a space had been left in the mountain, above the new road, caused by an old road having been there cut into the mountain. The Engineer ordered plaintiff to fill this space. Plaintiff made the fill, hauling and hoisting 206 cubic yards of material from another area for that purpose. This constituted an obliteration of the old road and did not enter into the structure of the new. The operation involved in the obliteration has not been paid for.

(3) From Station 00 to Station 7 on the Spur Line the Engineer ordered plaintiff to cut a ditch above the road, into the side of the mountain, to carry off water that was creating slides. The plaintiff did this work and from the ditch excavated 215.6 cubic yards, throwing the excavated material to one side. This ditch was not in the contract plans. The excavation was paid for as unclassified excavation, at 70 cents per cubic yard.

(4) At Station 84, Main Line, the relocation of a drainpipe had left a void which the Engineer ordered plaintiff to fill to the natural surface of the ground. Plaintiff made the fill, which amounted to 296.3 cubic yards, but has not been paid for this work. The fill was off the road area and was not structurally necessary thereto.

The fair and reasonable value of work done in handling the material described in this finding was not less than 70 cents per cubic yard.

17. Plaintiff bid $2.00 per cubic yard on an estimated 100 cubic yards of stone drain and also $2.00 per cubic yard on an estimated 800 cubic yards of handlaid rock embankment.

The specifications provided that stone drain should be clean broken stone ranging from 1 to 3½ inches in size. The method of placing it was set forth as follows:

> Where stone drain is to be constructed, form boards or other supports shall be placed as directed by the Engineer, and the stone placed within before the adjacent embankment is constructed. The stone of the drain shall be tamped into place, and the adjacent embankment placed and consolidated in layers. After removal of the forms or supports, embankment material shall be rammed in place to replace the volume they occupied.

As to handlaid rock embankment the specifications provided:

> *Materials.*—The stones for this work shall be sound and durable, not less than one-half cubic foot in volume, and may be taken from the adjacent excavation.
>
> *Construction Methods.*—An adequate footing shall first be excavated in stable ground along the toe of the slope of the proposed fill. The selected stone material shall be placed by hand on this prepared footing and additional stone laid up to the width and dimensions directed. Care shall be taken to have the stones bonded to some extent and securely bedded. Spalls shall be used to fill voids. The handlaid rock embankment thus constructed shall be backed by the usual embankment placed as prescribed under earthwork.

Directly behind the Big Wall at Station 44, Main Line, and within the embankment that it was designed to retain, the Engineer required plaintiff to lay stone for the purpose of drainage, forming the field which was to drain through pipes or so-called "weepers" in the base of the wall and away from the road.

The plaintiff backed up the Big Wall with stone drain extending from the bottom up to the ground level, varying in thickness 1½ to 4 feet. The stone was dumped in by trucks and pushed down by bulldozers. In finishing off there were places in the embankment where the stone was laid by hand.

Defendant paid the plaintiff for stone drain or handlaid rock embankment behind the Big Wall, 507.82 cubic yards at $2.00 per cubic yard, $1,015.64.

There is no satisfactory proof that plaintiff was required to or in fact laid more stone drain or rock embankment behind the Big Wall than 507.82 cubic yards.

18. Below Stations 30 and 39 on the Main Line there were dwelling houses at the foot of the mountain. It was therefore necessary to build handlaid rock embankment in the nature of a wall to retain the fill. The fill later on was not wide enough and it became necessary to make the handlaid rock embankment higher, which had the effect of concealing the lower section. At the request of plaintiff's superintending engineer a record was kept by defendant's project manager of the dimensions of the lower rock embankment before it was covered up.

The first rock embankment consisted of 382.5 cubic yards. Of this amount plaintiff has been paid for 123.8 cubic yards, leaving 258.7 cubic yards unpaid for, which at the contract rate of $2.00 is $517.40.

19. For clearing and grubbing plaintiff bid $150.00 per acre on an estimated 33 acres. This was to be done "within the limits of the slope stakes and for a distance of 5 feet beyond such stakes if ordered by the Engineer."

No clearing or grubbing was staked in obliteration areas and no payment was made for any clearing or grubbing therein. There is no satisfactory evidence that plaintiff cleared and grubbed in excess of the acreage for which he was paid.

20. A necessary part of plaintiff's work was properly sloping and rounding the banks up the mountain from the roadbed. The plaintiff did this portion of the work under the oversight of a Government inspector. The work, however, was not done to the satisfaction of the Engineer, who

required much of it to be done over again, and the areas complained of were resloped and rerounded by the plaintiff.

Among the areas so resloped and rerounded were areas which had been damaged by slides resulting from heavy rains after the original sloping and rounding had been done. The task of resloping and rerounding these damaged areas included repair to the damage done.

There is no evidence of the cost to plaintiff of repairing this damage, apart from the second sloping and rounding, and there is no satisfactory proof that any second operation of rounding and sloping on the project was outside the requirements of the contract.

21. Depicted in the contract plans was a certain so-called "Rustic Guard Rail," which was to be erected at selected places alongside the roadway.

Under the usual Government inspection and the inspection also of the Government's landscape architect, the plaintiff constructed the guard rail by employing an approved subcontractor. After completion the architect was not satisfied with it in many points and the Engineer ordered plaintiff to make the changes and alterations desired by the architect.

Before these changes and alterations were made a major slide occurred destroying a part of the guard rail. In order to make the changes and alterations and replace destroyed rail the plaintiff purchased 250 additional rails at a cost price of $562.50.

The plaintiff made the necessary replacements and made the changes and alterations desired by the architect, at an approximate labor cost of $450.00, a total cost of $1,012.50 for labor and material. The proper apportionment between replacements due to slide and changes, and alterations due to the criticisms of the architect does not appear.

22. The plaintiff began laying rubble gutter and laid a section in accordance with the specifications. Before plaintiff had grouted the section the Engineer observed water coming up through the joints and required plaintiff to remove the gutter, place tile drain thereunder, and replace. After completion the Government's landscape architect was not satisfied with the appearance and the plaintiff was ordered by the Engineer to remove the gutter again and re-

place with one conforming to the architect's idea. The architect's idea included the exclusive use of weathered stone in the gutter as well as changes in shape of the stone, none of which was provided for by the contract.

Plaintiff has been paid at the contract rate of $1.50 for rebuilding 73 square yards of grouted rubble gutter. There is no satisfactory proof that plaintiff is entitled to more. There is no proper proof of the extra cost of incorporating weathered stone in the gutter in place of random stone.

23. At Station 17+15 on the Main Line, plaintiff was ordered to and did lower a pipe culvert that had already been installed and filled over. This necessitated a second excavation and backfilling. There is no proof of the cost of this extra work.

24. The contract provided:

> Until the acceptance of the work by the engineer as evidenced in writing, the contractor shall have the charge and care thereof and shall take every necessary precaution against injury or damage to any part thereof by the action of the elements, or from any other cause, whether arising from the execution or from the non-execution of the work. The contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the work occasioned by any of the above causes before its completion and acceptance and shall bear the expense thereof, except damages to the work due to unforeseeable causes beyond the control of and without fault or negligence of the contractor, including but not restricted to acts of God or of the public enemy, acts of the Government, slides found by the engineer to have been unavoidable, and ordinary wear and tear on any section of the road opened to traffic by order of the engineer. In case of suspension of work from any cause whatever, the contractor shall be responsible for all materials and shall properly store them, if necessary, and shall provide suitable drainage of the roadway and erect temporary structures, where necessary.

It also provided:

> The Contractor will not be required to keep the roadway open to traffic during construction.

On January 20, 1936, the Engineer in letter to the plaintiff called his attention to certain unfinished work, concluding:

> On completion of the above work, another inspection will be made and if everything as noted is satisfactory, shut-down order will be given pending Mr. Allen's return.
>
> It is my understanding, at this time, that, if the work is completed satisfactory to the Park Superintendent and Landscape Architect and the Bureau, with the exception of the surface treatment operations, partial acceptance in accordance with the contract can be given and complete final acceptance given on completion of the surface-treatment work.

The roadway had not been completed by the time winter set in. It could not be finally surfaced in winter weather and the Engineer orally ordered plaintiff to shut down the work for the winter and maintain the road for traffic. The order to suspend construction was reduced by the Engineer to writing in April 1936, was dated January 31, 1936, and received by the plaintiff April 4, 1936. It is as follows:

> In accordance with the first paragraph of the clause "Temporary Suspension of Work" on page 10 of the Specifications, Form F. R. 50 (Revised 1932), for your contract No. I–1p–3791, dated March 25, 1935, you are hereby directed to suspend all construction operations on Project 1A1, Hot Springs National Park, effective as at the close of work on January 31, 1936, because of unsuitable conditions for the prosecution of the work.
>
> Construction operations will not be resumed until instructions to do so are received in writing from the Engineer in Charge.

The paragraph of the specifications, referred to in this letter, is as follows:

> The contracting officer shall have the authority to suspend the work wholly or in part, for such period as he may deem necessary, due to unsuitable weather, or to such other conditions as are considered unfavorable for the suitable prosecution of the work, or for such time as he may deem necessary, due to the failure on the part of the contractor to carry out orders given, or to perform any provision of the contract. The con-

tractor shall immediately respect the written order of the contracting officer to suspend the work wholly or in part.

The plaintiff was, in April 1936, orally directed by the Engineer to resume operations May 1, 1936. This the plaintiff did and the order was reduced to writing in May 1936, and received by the plaintiff May 18, 1936. The order is as follows:

> You are hereby directed to resume construction operations in connection with the construction of Project 1A1, Hot Springs National Park, Arkansas, effective May 1, 1936, under your Contract No. I–1p-3791, dated March 25, 1935.

The work of maintenance of the road for traffic required blading and dragging the road while it was being used for traffic, keeping drains open, removing the road slides and fallen rock. It was orally agreed between plaintiff and the Engineer during the period of maintenance that plaintiff should be paid the cost thereof.

Plaintiff maintained the roadway as directed until on April of 1936 he was partially relieved of the work of maintenance.

The cost of maintaining the road for traffic during the period of suspension has not been established.

25. The work was completed and accepted May 7, 1936, and the defendant on or about August 8, 1936, submitted to the plaintiff a statement of the balance it deemed him entitled to on the contract.

This estimate indicated a contract price of $190,563.69 including three extra work items, and previous payments of $180,943.99, leaving unpaid $9,619.70. From this unpaid balance the defendant deducted $2,320.00 as liquidated damages, being 58 days at $40 per day, a net balance of $7,299.70, which defendant paid to the plaintiff.

Upon substantial completion of the work plaintiff endeavored, for the purpose of checking up on the balance due him, to secure the location of the line as built. This information he could not secure to his satisfaction from the defendant, and he suspected that the defendant was underestimating the

amount of work done. He therefore secured the services of a surveyor and party to ascertain where the road was actually built on the mountain, and the true amount of yardage moved. The survey was made, at a cost to plaintiff of $707.89, from February 6, 1937, to March 26, 1937.

26. It is not possible from the evidence to apportion the number of days of delay between those for which the plaintiff was responsible and those for which the defendant was responsible.

27. During the progress of the work the Engineer adopted the practice of giving verbal orders for extra work or for changes from the contract plans or specifications, and the plaintiff carried out all such orders.

March 5, 1936, plaintiff was in writing requested to dig a berm ditch that was being staked out. Neither extension of time nor compensation was mentioned. There was no other written orders for changes or extra work.

Three several bills for extra work dated May 7, 1936, were prepared by the Engineer, for work previously done, aggregating $798.98, and were presented to the plaintiff for his signature. Plaintiff at first declined to sign them, but did so when on July 14, 1936, the Engineer refused to approve a final estimate of the balance due on the contract until the bills received his signature.

Neither the contracting officer nor anyone representing him has made findings of fact under Articles 9 and 15 of the contract, touching matters herein in issue.

28. On August 1, 1935, the plaintiff with respect to the yardage at that time computed by the defendant, wrote to the Engineer as follows:

> In reference to above it is our belief that something is radically wrong with the yardage as you now have it computed. We base this belief on a number of different factors entering into this.
>
> First, it is an obvious fact that every change that has been made in plans has tended to increase instead of decrease the original quantities. Second, it is a fact that your present cross sections do not check the original cross sections. Third, your present cross sections don't check with our original sections and the yardages taken by our survey party. Fourth, these

yardages do not check our hourly shovel records, showing hours worked in certain cuts and where this excavation was placed. For example, both original plans and your present computations show 22,500 yds. in the big fill at station 44 main line. Estimating at least a 20% shrinkage factor in a fill of this size, it would make this fill require at least 27,000 yds. to build it.

Our records show that we started excavation in cut at 46 x 00 on May 10th and spent a total of 87 shovel hours in this cut. This cut shows a yardage of 6,000 yds. according to your computations. We did not complete this cut owing to fact that we desired to use what was left for road surfacing. Taking for granted that we moved 4,000 yds. and put it into fill this would leave 2,000 yds. in this cut.

Our next move was to the spur line and intersection and as our plan called for making fill in order to get from Prospect to Whittington Avenue without going through town. All of this excavation for 118 hours shovel time was hauled to big fill and the roadway which we have used was built. It is obvious that this fill is somewhere around 60% complete, but according to your computations all the dirt that has been put in this fill is this 4,000 yds. out of big cut.

It is so obvious that something is wrong that we feel justified in making the following suggestion. We have something like two miles of this road put to grade and will have the balance outside of borrow in the next ten days. Rather than let this matter drag along until the final, would it not be a good idea to put a survey party on the completed graded sections, and take final cross sections now. Then take these final sections and plat them both on the original plan sections and also the sections as taken during the progress of the work.

We believe this method would pick up these errors at once and eliminate any future controversies.

The Engineer replied August 2, 1935, as follows:

I have your letter of the 1st relative to yardage on West Mountain. There has not been an opportunity, as yet, for me to check between the original sections and the construction sections, but this work is being done now to discover what discrepancies, if any, exist, and which would be the correct yardage.

If you have sections, which I hope you have taken, showing any variations, we will be very glad to check our work against them at any time. We cannot, how-

ever, base computation of yardage on an estimated shrinkage factor or on a matter of shovel hours. Shrinkage factor cannot be determined on a fill until the fill is completed. Your guess would be as good as mine—and mine is not 20%.

If you have these construction sections taken with your own field party, I believe that equitable payments can be made on the basis of comparison without going to the expense of sectioning at this time.

On September 3, 1935, the plaintiff communicated with the Engineer by letter as follows:

> Attached hereto is a list of changes and additions to project 1-A1 West Mountain. For our protection will you please check this list and if found correct, will you please approve this with a letter or give us a corrected list.

The items listed are not specifically involved in this case, and no change or extra order was issued covering them.

On December 16, 1935, the plaintiff in writing requested of the Engineer an order in writing for any additional work, claiming that there were or would be overruns on contract quantities, due to changes and other causes, on clearing and grubbing, excavation for structures, drainage structures and walls, unclassified excavation, overhaul, and other and minor overruns and extra work.

On February 26, 1936, the plaintiff by letter to the Engineer asserted a claim for additional compensation for extra work and materials on (1) guard rail, (2) gutter, (3) banded masonry walls and headwalls, (4) removing slides and resloping banks, (5) extra depth of certain inlets, (6) stonedrain back of Big Wall. To this letter the plaintiff attached a cost account of extra sloping, scarifying, reshaping, and adding stone due to slides, totalling $2,383.32.

On April 8, 1936, the plaintiff by letter to the Engineer asserted a possible claim for increase in unclassified excavation over the amount allowed and a claim for extra compensation for line change and slides caused thereby.

29. Plaintiff did not further prosecute his claims nor did the contracting officer or anyone representing him act upon them except as may herein appear.

Other items of claim here sued on are not sufficiently covered by proof to warrant findings concerning them.

The court decided that the plaintiff was entitled to recover $12,780.52.

JONES, *Judge*, delivered the opinion of the court:

Plaintiff by contract with defendant undertook to build 3.528 miles of road in Hot Springs National Park in Arkansas, to furnish all labor and materials and to perform all work in grading and surfacing same in accordance with drawings and specifications.

The general excavation was to be paid for at the rate of 70 cents per cubic yard. Other types of work were to be paid for at special named prices. The total price of the various units of material and labor was estimated to be approximately $184,292.25, and performance bond was executed in that amount.

Notice to proceed was received by the contractor April 10, 1935, thus fixing the date for completion in compliance with the terms of the contract as not later than November 21, 1935.

Plaintiff alleges breach of contract by defendant, uncompensated changes in construction requirements, damages for delay and unpaid balance, the total of the various items claimed being $135,787.68, for which he sues.

The road was to be built up the mountain-side adjacent to Hot Springs and within the park.

There is no doubt that considerable extra work was done. The evidence, however, is conflicting, some of the claims are indefinite, the blame not always easily fixed, and the record voluminous.

We have undertaken to sort the claims, to select those in which the amounts are proven with reasonable certainty, and in reference to which responsibility can be definitely fixed, and to disregard the others.

The evidence does not show that the contracting officer exercised any contractual authority other than the signing of the contract. The contract designated the Chief Engineer

of the Bureau of Public Roads and the District Engineer of such Bureau as authorized representatives of the contracting officer. Contractual authority on this project was exercised by the District Engineer acting through local engineers, the latter having charge of the work and plaintiff's working contact being with them. For convenience they will be referred to as the Engineer.

All the first bids exceeded the estimate made by the Engineer and were rejected. Some restrictions were removed and new bids called for. Plaintiff, who had bid on both invitations, was the low bidder in the second and was awarded the contract.

Between the two bids plaintiff had gone over the site with the Engineer. The project consisted of a roadway around the mountain in the form of an elongated major bend known as the Main Line and was about 2.1 miles long. From a point along the Main Line a spur line about 1.4 miles in length diverged and ran up the mountain having a loop or turn-around at its detached end. The Main Line was in effect the relocation of an existing road.

It was the duty of defendant's surveyors to stake the job for structures, inlets, drains, pipes, cuts, and fills.

There was some shifting of stakes on parts of the road without any change order and there were other changes in alignment from the contract plans in the same portion of the road. The net effect as to changes in excavation are not satisfactorily proved. They also had the effect of delaying construction, to what extent is indeterminable.

On another part of the road plaintiff was required to and did excavate rock for a ditch, also at picnic grounds and parking areas, none of which were shown on or required by the original plans. Plaintiff has been paid for this work at the rate of 70 cents per cubic yard, the rate stipulated for general excavation. The record strongly indicates that it was worth more and that plaintiff was paid less than adequate compensation. However, there was no formal change order and no agreement as to price. Plaintiff did not pursue the method plainly laid down in his contract in order to estab-

lish whatever rights he may have had, and therefore cannot recover additional compensation for this work.[1]

The 4,010 cubic yards of rock fall into a different category. This was a part of the general excavation and was a part of the building of the road. While it involved a change in the original contract plans such a change was authorized by the terms of the contract. These terms stipulated that the rate of pay for cuts and fills in the building of the road, regardless of classification, should be 70 cents per cubic yard. Plaintiff was paid at this rate. No other price was agreed upon and plaintiff did not protect his rights by pursuing the method set out in the contract. He is not entitled to recover any additional amount for this work.

Defendant disputes the question of whether there was an actual increase in the rock excavation when all the road that was affected by the change is taken into consideration, but even asserts there was a net decrease rather than an increase. However, since plaintiff is not entitled to recover on this item this becomes unimportant.

Additional subgrade excavation claimed by plaintiff is not satisfactorily proved.

The contract provided for payment for the hauling of material as directed more than 1,000 feet. The agreed price for overhaul was one cent per station yard. There is a balance due on this item of $2,653.26.

On another part of the road plaintiff, acting on plans that had been discarded by the Government (other plans having been duly furnished plaintiff) did considerable blasting before the error was discovered by his engineer. This wasted blasting was in no way the fault of defendant.

At Station 44 a retaining wall was built. This required considerably more excavation than had been anticipated, the Engineer requiring continuation until a good foundation was reached. Another change was made, at the suggestion of the Engineer but without change order, so that the wall was built of concerte with stone facing instead of wholly of stone. Also the plans for the retaining wall required that

[1] *Plumley* v. *United States,* 226 U. S. 545, 6, 7; *Hawkins* v. *United States,* 96 U. S. 689, 696.

"At least 50% of all exposed masonry shall be weathered surface." Without formal change order the Engineer required plaintiff to construct the exposed masonry of the wall entirely of weathered surface. This entailed extra expense and labor in searching for and transporting weathered stone. The amount of the extra cost, however, is not proved. All this work delayed the completion of the contract.

A large part of the excavation was through rock requiring drilling by jackhammer and air compressor. Plaintiff planned to do this work by night to make way for shovel operations. After the first night he was stopped by the Engineer, the reason being that night drilling disturbed the people of Hot Springs. Thereafter plaintiff was not allowed to drill at night. In an effort to make up for lost time, the drilling being a slow process, the plaintiff arranged for an extra compressor and jackhammers. The reasonable rental cost for the use of these for the period required was $1,140.00, which plaintiff incurred. The work was delayed but the extent is not shown by the record.

There was some delay on the part of the defendant in setting stakes and some of the grade and slope stakes were set by plaintiff, with permission of the defendant's representative. No material loss or delay is shown.

The defendant was responsible for some delays in moving the shovel due to error in staking for a pipe and other changes required by the Engineer. This entailed some extra expense but the amount is not definitely proved.

The plaintiff removed 6,585 cubic yards of material from the borrow pit and used it in constructing the road. The price therefor, according to the general schedule, was 75 cents per cubic yard. Plaintiff has not been paid any part of this sum. The excuse which defendant offers for nonpayment is that it had decided—after the work was over—that it was not necessary to take any material from the borrow pit. This defense cannot be sustained. According to the general schedule, which became a part of the contract, it was estimated that 13,400 cubic yards would be used from borrow pit. Defendant's surveyors made contour and cross section surveys before and after the material had been

removed by the plaintiff. The material was used in embankments, shoulders and other fills with the full approval of defendant's officer in charge. Excavation from the borrow pit was used for a time by the Engineer in calculating estimates for progress payments on the job. The plaintiff had even been required to deed to defendant the lot upon which the borrow pit was located and was told that he could not get progress payments until he had actually executed and delivered the deed. It is hardly necessary to add that he deeded the lot. This lot was purchased and paid for by plaintiff with the approval of the Engineer after he had declined pursuant to the contract to let plaintiff secure material from any point within the park. The defendant even specified the part of the lot from which the material should be taken, designating and staking off the back part of the lot in order to protect the beauty of the park. This required a longer haul and additional work but plaintiff readily complied.

With this array of facts it would naturally be thought that this item of excavation would be paid for without question. In making the final estimates, however, upon which the last payment on the contract was made, the Engineer decided that plaintiff could have made all the fills to the contract limits from cuts without the use of any borrow. Although this was vigorously disputed by other witnesses, plaintiff was finally paid nothing for the material secured from the borrow pit. It had been included in the estimates made for progress payments, but was deducted in its entirety in making final settlement. On the Engineer's estimates of amounts taken from the borrow pit plaintiff had paid his subcontractor for hauling such material.[2] In these circumstances it is unthinkable that plaintiff should not be paid for this work. He is entitled to recover for this item the sum of $4,938.75, the price specified in the contract.

The lot was transferred to and became the property of the Government. It was later, together with other property, by special act,[3] transferred to, became and is now a part

[2] *Price* v. *Chicago, S. F. & C. Ry. Co.*, 38 Fed. 304, 307.
[3] 49 Stat. 1516.

of the Hot Springs National Park, the act providing that payment therefor should be made out of money already appropriated. Despite this, plaintiff has not been paid for the lot thus taken.

Plaintiff claims that the value of the lot was greatly in excess of $300.00 and offered testimony to that effect. Such witnesses, however, admitted that there was little market at the time for such property. We find that the value of the lot at the time of the taking was $300.00, which plaintiff is entitled to recover.

There is a balance due plaintiff, in the sum of $559.50 for unclassified excavation for structures, on which plaintiff's bid of $1.50 per cubic yard had been accepted.

Plaintiff was required to dig a ditch and waste the material therefrom into ravines and conceal it by a covering of leaves, which necessitated disposal of the material by hand shovel and wheelbarrow. He was paid for the excavation as unclassified, but for disposing of it afterward as specially directed he was not paid. There was no written change order and no agreement as to price, and plaintiff is not entitled to recover on this item.

Plaintiff is entitled to recover for 206 cubic yards of material which he was required to haul and hoist in order to fill in a space that had been left in the mountain above the new road, which space had been caused by an old road that had been cut into the mountain. He is entitled to recover 70 cents per cubic yard as the reasonable value of this work,[4] which is the amount also named in the specifications.

At Station 84, Main Line, the relocation of a drain pipe ordered by the Engineer had left a void and plaintiff was directed to fill this to the natural surface of the ground. It was off the road area and was not structurally necessary thereto. Plaintiff has not been paid for this work. He is entitled to recover for 296.3 cubic yards at the rate of 70 cents per cubic yard, the amount designated in the specifications, which is also the reasonable value of the work done.

There is a balance of $517.40 due plaintiff on rock embankment below Stations 30 and 39 for work done at the contract rate.

[4] *Hunt* v. *United States*, 257 U. S. 125.

The defendant, in making payment to plaintiff, deducted liquidated damages at the rate of $40.00 per day for 58 days' delay, a total of $2,320.00. It is not possible from the evidence to apportion the number of days of delay for which the respective parties were responsible and hence the liquidated damages should not have been deducted.[5]

Several other claims covering various items were presented by plaintiff. Some of them have substantial merit, but the proof is not sufficient under the terms of the contract to justify recovery. In some instances there was no written change order. In others the actual damages were not proved. The facts in reference to them are set out in detail in the special findings of fact. They will not be repeated here.

Plaintiff's willingness to cooperate was the occasion for his doing considerable extra work which he would not have been required to do without additional compensation under the strict terms of his contract. Unfortunately, his failure to comply with the method set out in the contract for protecting his rights, and his failure to produce records showing the amount of his damage make it impossible to allow him for such items.

Plaintiff is entitled to recover the sum of $12,780.52.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

STANLEY A. JERMAN, RECEIVER FOR A. J. PETERS CO., INC., v. THE UNITED STATES

[No. 44240. Decided April 6, 1942. Plaintiff's motion for new trial overruled October 5, 1942]

On Defendant's Plea of Fraud

Fraudulent claim against the Government; an invoice constitutes a claim; rights of receiver.—Where the A. J. Peters Company, Inc., entered into certain contracts and purchase orders with the Government for hay and forage; and where it is found that said Peters Company fraudulently changed the grades of hay shipped to the Government, from the grades found by the

[5] *Sun Shipbuilding & Dry Dock Co.* v. *United States*, 76 C. Cls., 154, 188.

authorized inspectors to higher grades, and thereby charged the Government for better quality hay than was actually shipped; it is *held* that said Peters Company thereby attempted to practice, and did practice, a fraud upon the United States within the meaning of the statute (U. S. Code, Title 28, section 279), and the claims made by the plaintiff, receiver, are accordingly forfeited to the United States under said statute.

Same; fraudulent invoice.—The presentation of an invoice for goods sold to the United States constitutes a "claim" against the United States within the meaning of the statute. *Furay* v. *United States*, 34 C. Cls. 171; *New York Market Gardeners' Association* v. *United States*, 43 C. Cls. 114 cited.

Same; receiver takes claim cum onere.—A receiver takes *cum onere* a claim of the insolvent whose assets he is appointed to conserve and liquidate. *Baird* v. *United States*, 76 C. Cls. 599, overruled in part; *Globe Indemnity Co.* v. *United States*, 84 C. Cls. 587; certiorari denied, 302 U. S. 707, cited.

The Reporter's statement of the case:

Mr. B. J. Gallagher for the plaintiff. *Mr. M. Walton Hendry* was of counsel.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Charles Bertrand Bayly, Jr.*, was on the brief.

The court made special findings of fact as follows:

1. This is a suit brought by Stanley A. Jerman, receiver for A. J. Peters Company, Inc., duly appointed by the Superior Court of Maricopa County, Arizona.

The A. J. Peters Company, Inc., was engaged in the wholesale grain and hay business during the years 1917 to 1919 and during that time entered into certain contracts and purchase orders with the United States. The contracts are contained in defendant's exhibit 1 and by reference are made a part of this finding.

2. This suit is brought under Private Act No. 530, 75th Congress, 3d Session, 52 Stat. 1316, providing as follows:

For the relief of Stanley A. Jerman, receiver for A. J. Peters Company, Incorporated

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of Stanley A. Jerman, receiver

for A. J. Peters Company, Incorporated, for forage delivered by the said A. J. Peters Company to the Quartermaster Corps, War Department, during the late World War, and the years 1917 and 1919, inclusive, and used by the War Department, for which no payment whatever has ever been made under the following contracts and orders: P. O. 20847, P. O. 21212 to P. O. 21217, both inclusive, P. O. 21219, P. O. 21319, P. O. 21320, P. O. 21469, P. O. 21494, 51, contract dated March 31, 1917, P. O. 2350 to P. O. 2352, both inclusive, P. O. 20260, P. O. 20836 to P. O. 20838, both inclusive, be, and the same is hereby, referred to the United States Court of Claims with jurisdiction to hear and determine the same to judgment: *Provided*, That the petition is filed within six months from the date of this Act.

Approved, May 24, 1938.

Plaintiff filed suit on November 12, 1938, which was within the six months' period required by the Act.

3. The sum of $30,014.80 is claimed by plaintiff for forage delivered to the United States under the various contracts and purchase orders hitherto set forth, and for which no payment has been made.

The United States by leave of Court filed a special answer March 23, 1939, setting up fraud on the part of the A. J. Peters Company in altering the invoices of the hay furnished the United States as to amount and grade, and a consequent forfeiture of plaintiff's right to recover any amount of its claim under the provisions of 28 U. S. C. 279–280.

4. In 1917 the United States was buying large quantities of forage in the southwestern part of the country. The growers and dealers of the Salt River valley area in Arizona, one of the large hay-producing areas, organized the Salt River Valley Hay Dealers Association to inspect, weigh, and grade hay which was shipped out of the region. The association determined the different grades of hay and straw, according to rules acceptable to the defendant, and appointed inspectors to grade and weigh the forage when loaded on railway cars for shipment to the defendant and other consignees.

Mr. A. J. Peters, president of the A. J. Peters Company, was a member of the association. Mr. J. N. Jaggers was its Chief Inspector.

5. The practice of the A. J. Peters Company when loading its hay was to have an association inspector grade and weigh the forage at the loading point. This inspector prepared inspection slips showing the grade of hay and its weight.

In addition to the inspector for the Hay Dealers Association, an inspector employed by A. J. Peters Company also checked the weights of the cars as loaded.

The report of the association inspector and the car loading report of the Peters Company were then turned over to the office of the Peters Company in order that bills of lading and invoices could be prepared by that company for the United States, the consignee.

The invoice, as provided by the rules of the association, was accompanied by a certificate of grade signed by the Chief Inspector for the association.

It is in respect to the methods of the A. J. Peters Company in preparing its invoices that the charge of fraud is made. The defendant charges that in many instances the grade of hay determined by the association inspector at the point of loading was changed from a lower to a higher grade and that the weight of hay was increased over what the inspection slip set forth as the actual weight of hay.

6. In 1919 A. J. Peters was indicted for fraud in connection with the forage transactions involved herein. He was tried and the jury disagreed. The indictment was nolle prossed by the United States Attorney in 1925.

7. The United States in May 1920 employed Charles F. Kanen to audit the forage contracts of the A. J. Peters Company with the United States. Another auditor, John W. Boyle, assisted Kanen in checking the contracts, weights, and grades. An experienced freight expert also audited and checked the freight car weights and forage weights. This audit, defendants' exhibit 1, is by reference made a part of the findings.

In preparing the audit, all available records concerning the hay sold the United States by the A. J. Peters Company, many of which were found in the company's office, were examined. These records included the contracts and

purchase orders, inspection reports, bills of lading, field weight loading slips, shipping tickets, receiving reports, Government vouchers of payment, freight bills, and weight and grade certificates.

8. In determining the weight of hay shipped by the Peters Company to the various points of destination, reports of the Transcontinental Freight Bureau and the Western Weighing Association were used along with other available documents, by the auditors. The Transcontinental Freight Bureau is a bureau of weighers established for the weighing of cars for railroad companies. The loaded cars are weighed en route and at destination; the tare weight of the car, that is, the weight of the car unloaded, is then subtracted from the gross weight. The information is available for shippers, dealers, and railroads. The Western Weighing Association performs a similar service. The method used by the Transcontinental Freight Bureau and the Western Weighing Association is the usual method employed by railroad men in determining box car loads.

Freight cars built of wood dry out and lose weight after a considerable lapse of time in the southwest area. The evidence does not furnish any measure of this loss of weight.

9. The papers relating to these transactions were used in the trial of Peters for fraud, and while available to the auditors at the time of the audit some of the vouchers, bills of lading, etc., covering the many transactions have been lost, and therefore many of those papers are not contained in the present record.

There is no evidence of suppression of evidence or of gross carelessness by the United States in the loss of these papers.

10. The Chief Inspector of the Salt River Valley Hay Dealers Association, J. N. Jaggers, made his headquarters in the office of the A. J. Peters Company. As provided by the rules of the association, he made out an inspection certificate, showing the number of bales and the grade of hay shipped on a particular car. This certificate was prepared to be forwarded with the invoice of the Peters Company to the defendant.

11. The rules of the association instructed the inspectors that in case of doubt as to the grade of hay, the doubt was to be resolved in favor of the shipper. Hay was graded as follows: Choice Alfalfa, No. 1 Alfalfa, Standard Alfalfa, No. 2 Alfalfa, No. 3 Alfalfa, and No Grade Alfalfa. Each separate grade carried a price differential in the market of two dollars per ton from the next grade. The same designation of grade and the same price differentials were used in the invoices and the audit.

Alfalfa hay for feeding purposes under Government standards includes the following grades: Choice Alfalfa, No. 1 Alfalfa, and Standard Alfalfa. Hay below these grades is classified as bedding. In the audit, however, because during the time covered by the contracts here involved, the United States had accepted and paid for a quantity of No. 2 Alfalfa as feeding hay, this was treated by the auditors as forage. Alfalfa No. 3 and Alfalfa No Grade were classified as bedding and were priced at $12.00 per ton.

12. The grade of hay designated in the Peters invoice and the inspection certificate signed by Jaggers always conformed to the grade required under the particular contract. If Jaggers was present when the shipment was made, he always made out the Association certificate to conform to the contract, even though the field inspector's certificate assigned a lower grade to the hay. He left in the custody of the Peters Company a number of certificates signed in blank by him and instructed an employee of the company to make out the certificates in the same way if he was not present. The employee complied with the instruction, with knowledge that the assigned grades were not the true grades of the hay.

13. It was the practice of the office employees of the Peters Company to prepare the invoices on shipments to the defendant so as to show compliance with the requirements of the contracts to which they related.

14. The findings of the audit as to the grades of hay shipped represent a study of all of the inspection slips, inspection certificates, and invoices available to the auditor in 1920. Defendant's exhibits 6 to 39 and 45 to 53, both inclusive, show some of the instances of changed grades on

various shipments and consist, for each carload, of the field inspection slip of the association inspector, showing his determination of the grade of the hay, the Jaggers certificate, and the invoice, both of which latter showed a higher grade.

15. Neither J. N. Jaggers nor A. J. Peters personally inspected the hay covered by most of the invoices in which the grade was raised from that shown in the field inspector's slip to that required by the contract.

16. In only a relatively small proportion of shipments was the hay weighed by the defendant's agents upon arrival at destination. When it was weighed and discrepancies were discovered between the weights stated in the vouchers and the actual weights, the necessary adjustments were made before the price was paid.

17. The defendant has shown in exhibits 2–A, B, C, 3–A, B, C, 4–A, B, C, 5–A, B, C, and 30–A, B, C, D, made a part hereof by reference, instances of increases in weight over the weight shown by the inspection slip of the association inspector. These exhibits include, for the various carloads, the inspection slip, the weight slip prepared by the Peters Company, and the invoice.[1]

The field inspection slips consisted of a series of figures, representing the weight of groups of bales, and a total, representing the weight of all the bales in the carload. The Peters weight slips consist of the same series of figures, with minor variations in amount, and a much greater, and erroneous, total. For example, in exhibit 3, the figures in the field inspection slip are 5,060, 5,870, 4,580, 3,250, and *2,620*, a total of 21,380 pounds. The Peters weight slip adds 5,060, 5,870, 4,580, 3,250, and *2,700*, and shows a total of 22,360, a difference of 980, although the only difference in the component figures was one of 80 pounds in the last of the sums added. In exhibit 2, the inspector added *4,550*, 1,830, 3,770, 3,680, 3,120, and 375 for a total of 17,305.[2] The Peters slip added *4,530*, 1,830, 3,770, 3,680, 3,120, and 375, and showed a total of 18,305. The

[1] Exhibit 30 does not include the Peters weight slip.
[2] The correct total should be 17,325.

differences of weight shown in exhibits 4, 5, and 30 were, respectively, 2,005, 1,994, and 580 pounds.

In defendant's exhibits 6 to 29, 31 to 39, and 45 to 53, which show cases of changed grades, the weight appearing in the invoice is that shown by the inspector's slip.

18. A schedule of all the contracts contained in the audit is set forth below. It shows the grade charged by the Peters Company to the defendant under the heading "Dealer's grade" and the correct grade as determined from the Association inspection slips under the heading "Correct grade." The column "Dealer's weight" is the weight billed on the invoice and the column "Correct weight" is the auditor's determination of the correct weight from a study of the inspection slips and the Freight Bureau records. It shows that the weights appearing on the invoices exceeded the correct weight as determined by the auditor by a total of 695,913 pounds.

Contract No. and date	Dealer's grade	Correct grade	Dealer's weight	Correct weight
Cont. 3/31/17	Straw		623, 190	601, 750
" 51 6/13/17	Alf. Feeding Hay		2, 952, 720	2, 892, 121
2350 2/5/19	" Standard	No Grade Standard	1, 319, 922	1, 297, 620
2351 2/5/19	" "	No Grade Standard	1, 257, 773	1, 204, 059
2352 2/5/19	" "	No. 2 Standard	1, 197, 139	1, 123, 519
20260 2/14/19	No. 1 Wheat Straw or Oat	No. 2 No. 1	256, 485	253, 690
20836 3/27/19	Alfalfa No. 1	Standard	21, 460	20, 460
20837 3/27/19	" "	Standard	33, 895	32, 080
20838 3/27/19	" "	Standard No. 1	1, 451, 740	1, 303, 309
20847 3/27/19	" Standard	No. 3 Standard	431, 070	518, 110
21212 4/17/19	" No. 1	No Grade No. 1	1, 027, 835	975, 195
21213 4/17/19	" "	No. 2 No. 1	919, 308	881, 981
21214 4/17/19	" "	No. 2 No. 1	925, 420	888, 950
21215 4/17/19	" "	No Grade No. 1	852, 015	803, 290
21216 4/17/19	" "	No Grade No. 1	522, 185	484, 196
21217 4/17/19	" "	No Grade No. 1	1, 377, 192	1, 322, 312
P. O. 21219 4/17/19	" "	No Grade No. 1	499, 640	482, 095
21319 4/23/19	" "	No Grade No. 1	1, 248, 171	1, 196, 750
21320 4/23/19	" "	No. 2 No. 1	657, 095	621, 775
21469 5/5/19	Oat & Alf. Hay No. 1	No. 1	234, 530	217, 280
21494 5/8/19	" " " " "	No. 1	276, 290	268, 620
Pen Market	Straw and Hay	Straw Hay	---------- 197, 565	---------- 197, 565
			18, 282, 640	17, 586, 727

19. It has not been proved that the A. J. Peters Company fraudulently raised the weight of the hay in its invoices to the defendant.

20. The A. J. Peters Company fraudulently changed the grades of the hay shipped to the defendant from the grades found by the association inspectors to higher grades and charged the defendant for hay of better quality than it actually shipped to the defendant, thereby attempting to practice and practicing a fraud upon the United States.

21. The invoices of the A. J. Peters Company for hay sold to the defendant totalled $208,542.84. The defendant paid the Peters Company the sum of $171,361.03 and made certain uncontested deductions in the sum of $7,167.01, leaving an unpaid balance of $30,014.80, the amount claimed in this suit. As a result of the audit in 1920, corrections for grade and weight and miscellaneous adjustments were made in the account and the auditor determined that the A. J. Peters had overcharged the defendant in the sum of $27,586.44, leaving an unpaid balance of $2,428.36, uncontested by the defendant except by its plea that plaintiff's claim is forfeited for fraud.

The court decided that the A. J. Peters Company, Incorporated, corruptly attempted to practice, and did practice, fraud in the establishment and allowance of its claim against the United States; and that the claim in suit was thereby forfeited to the Government of the United States and that plaintiff is forever barred from prosecuting said claim.

Madden, *Judge*, delivered the opinion of the court:

Plaintiff, receiver for the A. J. Peters Company, sues for an alleged unpaid balance of $30,014.80 due the Peters Company for hay sold by it to the defendant during the years 1917 to 1919. The total amount of the Peters Company's sales to the defendant during this period was $208,542.84. Vouchers for the amount plaintiff claims here were prepared by the defendant's agents after the hay was delivered, but the vouchers have never been paid by the defendant. It asserts that plaintiff's claim is a fraudulent one, and is

therefore forfeited under an applicable statute.[3] It also asserts that even if there is no forfeiture, plaintiff is entitled to recover only $2,428.36, the amount shown to be due by an audit made by the defendant, which, it asserts, corrected the grades and weights of the shipments of hay and reduced the amounts which the defendant should have to pay for them.

The history of the Peters Company's transactions with the defendant is as follows. The War Department was buying large quantities of hay during the First World War. It entered into a number of contracts with the Peters Company for various quantities of hay at specified prices for the different grades. The Peters Company, of which A. J. Peters was the president and dominant figure, bought hay from farmers in the Salt River valley region of Arizona to fill its orders from the defendant.

An association, the Salt River Valley Hay Dealers Association, had been established by the hay growers and dealers of the region, one of the purposes of which was to inspect, weigh, and grade hay which was shipped out of the region by members, and to furnish the purchaser certificates of the association as to the grade of the hay sold. For that purpose, it provided inspectors at the railroad stations from which hay was shipped. Purchasers, including the defendant, would naturally have more confidence in the certificate of an association inspector stating that his examination of the hay showed it to be of a certain grade than they would have in a similar statement by the seller of the hay. The object of the association apparently was to make sure that the seller received fair treatment in any controversy about the grade of the hay, and also to build a reputation for the association and the region for integrity in its grading.

[3] 28 U. S. C. 279. That statute provides: "Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or any part of any claim against the United States shall, ipso facto, forfeit the same to the Government: and it shall be the duty of the Court of Claims in such cases to find specifically that such fraud was practiced or attempted to be practiced and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same."

One J. N. Jaggers was the Chief Inspector for the association. He did not, at least in most instances, personally inspect the hay which plaintiff shipped to the defendant. Yet, in making out the association's official inspection slips which were intended to accompany plaintiff's invoice to the defendant, Jaggers, on all occasions when the actual inspection made by his subordinates showed hay to be of a grade inferior to that ordered by the defendant, raised the grade of the hay to make it accord with the defendant's order. Jaggers was present in the Peters Company office much of the time. For use on occasions when he was not present, he left with the company a sheaf of association certificates signed in blank by himself, which could be filled out by the Peters Company.

The Peters Company, when it made a shipment of hay to the defendant, made out an invoice showing that a specified number of pounds of hay of a specified grade had been shipped. This invoice, accompanied by an inspection certificate signed by Jaggers for the association, and which in all instances accorded with the invoice as to grade, was sent to the defendant. The papers in evidence show that as to 5 shipments the weights marked by the actual inspectors for the association on their working slips were raised by 580, 1,000, 980, 2,005, and 1,994 pounds on the Peters Company's invoices. As to the 42 other shipments on which the papers in evidence show that the Jaggers certificate and the Peters Company invoice raised the grade of hay above that shown by the association inspector's slip, the Peters Company's invoice was in agreement with the inspector's slip as to weight. An auditor for the defendant, who studied the available information in 1920, concluded that plaintiff's invoices had, in all the shipments, charged to the defendant 695,913 pounds more hay than had been actually shipped to it by the Peters Company. The auditor seems to have reached that conclusion by a comparison of weights recorded by the railroads which carried the hay and the weights shown on the Peters Company's invoices.

Plaintiff claims that the raising of the grade proves nothing except a difference of opinion, presumably honest,

between Jaggers and the Peters Company on the one hand and Jaggers' subordinates, the actual inspectors for the association, on the other. But neither Jaggers nor A. J. Peters inspected the hay in most instances, or had any basis for opinions differing from those of the actual inspectors. Two of those inspectors, who were called as witnesses by the defendant, testified that they followed the association rules for grading, and that in case of doubt they gave the shipper the benefit of the doubt, i. e., the higher grade, as the rules of the association prescribed. In these circumstances we would be credulous indeed if we were to fail to find that Jaggers and the Peters Company conspired to fraudulently grade the hay to make it correspond with that called for by the Peters Company's contracts with the defendant. We have concluded that they did so conspire.

As to the discrepancy in weights between the Peters Company's invoices and the railroad weights as discovered by the auditor, we are unable, on the basis of the evidence, to discover what the actual facts are. The defendant introduced 47 exhibits to show that the grade of the hay in that many carloads had been raised by Jaggers and the Peters Company. One would suppose that if there was fraud as to the weights, it would have occurred as frequently in those carloads as in others of the approximately 750 carloads shipped under the contracts. Yet as we have said, in only five carloads out of the forty-seven was there any difference in weight between that stated on the slip made out by the association inspector and that stated on the Peters invoice. The total of that difference was, in pounds, 6,559. If discrepancies in weight occurred in the same proportion in the approximately 750 carloads shipped as in the 47 as to which we have the association inspector's slip, that would have made a discrepancy of only some 100,000 pounds in all. Yet the auditor finds that the actual weights were 695,913 pounds less than the Peters Company's invoices. We do not find, from the evidence, that the Peters Company practiced fraud as to the weight of the hay.

Plaintiff argues that the statute forfeiting fraudulent claims does not apply to this case for the reasons (1) that the mere presentation of an invoice for goods sold does not

constitute a "claim" against the United States within the meaning of the statute and (2) that plaintiff here, being a receiver and personally innocent of any fraud, should not lose his claim because of the fraud of the insolvent, the Peters Company.

We think the statute is applicable to the Peters Company's fraudulent practices, and that plaintiff as receiver takes the Peters Company's claim *cum onere*. As to the first point, the presentation of a fraudulent invoice must have been within the intent of the statute, unless the word "claim" is to receive an interpretation so narrow as to exclude nearly all transactions with the government except actual suits either in court or before a quasi judicial officer or agency. The statute giving jurisdiction to this court says that it may hear and determine the following matters, *inter alia* (United States Code, tit. 28, sec. 250):

> 1. Claim against the United States.—First. All claims * * * founded * * * upon any contract, express or implied, with the government of the United States * * *.

If one delivers to the government a quantity of groceries pursuant to a contract, and sends an invoice or bill with them, and he is not paid as agreed, he may sue in this court, pursuant to the jurisdictional act. That means that, in Congressional parlance, he had a "claim" as soon as he had delivered the groceries and the bill or invoice therefor, and that his invoice was sent to "establish" or obtain the "allowance" of his claim within the meaning of Section 279. We do not think that Congress would have had any reason for distinguishing between, or showed any intention to distinguish between, the presentation of a false invoice to a purchasing agent of the government having authority to issue a voucher for its payment, and a similar presentation to the Comptroller General or to the court. In any case its purpose is to fraudulently obtain money from the United States. The statute seems to us to mean that such an attempt results in the forfeiture of whatever right might have otherwise resulted from the transaction. See *Furay* v.

United States, 34 C. Cls. 171; *New York Market Gardeners' Association* v. *United States*, 43 C. Cls. 114.

As to the argument that the defense of fraud cannot be invoked against a receiver, who is personally innocent, it would go far to defeat the purpose of the statute if it were given such an interpretation. If the contractor could commit fraud with the chance that it would not be detected and he would enjoy the profit from it, and the assurance that, even if his fraud should be discovered, no loss would result if the suit were brought by his executor, administrator, trustee in bankruptcy, or receiver, a substantial part of the deterrent effect of the statute would be lost and there would be a considerable proportion of suits in which the defense of the statute would not be available to the government at all. There is no reason why the right of the receiver should be other than that of the insolvent whose assets the receiver is supposed to conserve and liquidate. He is not a purchaser for value without notice, or a purchaser at all. He does not take even negotiable paper free of defenses good against the insolvent (*Williams* v. *Green*, C. C. A. 4th Cir., 23 F. (2d) 796), nor legal title to property free of equities arising out of fraud or other circumstances and enforceable against the insolvent. See High, Receivers, 4th ed., secs. 201–206.

In the case of *Baird* v. *United States*, 76 C. Cls. 599, a subcontractor of a contractor, bankrupt at the time of suit, the suit being brought by the trustee in bankruptcy, had committed fraud in the performance of the part of the contract sublet to it. The court held that the government could not, for two reasons, forfeit the claim under the fraud statute. One reason was that the subcontractor's fraud was not, so far as concerned the application of the forfeiture statute, attributable to the contractor who had not participated in it. The other reason was that the suit was by the trustee in bankrupcy, who had had no part in the fraud. As to the second reason assigned by the court for the decision in the *Baird* case, we have concluded, upon a reconsideration of the question, that it is not a valid reason, and we do not follow it in this case. See *Globe Indemnity Co.* v. *United States*, 84 C. Cls. 587, certiorari denied, 302 U. S. 707.

From the foregoing it follows that the defendant's Plea of Fraud must be sustained, and the court adjudges the claims made by the plaintiff to be forfeited to the United States. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CASES DECIDED

IN

THE COURT OF CLAIMS

April 1, 1942, to June 30, 1942.

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 44577. APRIL 6, 1942

Republic Steel Corporation.

Income tax; consolidated return; 80 percent interest or control in reorganization; acquisition of assets in reorganization; basis for depreciation.

Decided October 6, 1941; plaintiff entitled to recover. Opinion 94 C. Cls. 476. Judgment for the plaintiff in the sum of $196,584.74, with interest, December 1, 1941.

Defendant's motion for new trial, filed January 30, 1942, overruled April 6, 1942.

No. 44744. APRIL 6, 1942

Stanley M. Barnes.

Pay and allowances; unmarried officer in U. S. Navy with dependent mother.

Decided January 5, 1942; plaintiff entitled to recover. Opinion 95 C. Cls. 411.

Upon a report from the General Accounting Office showing the amount due under the opinion of the court, judgment for the plaintiff in the sum of $2,594.26 was rendered on April 6, 1942.

No. 45026. APRIL 6, 1942

Warner U. Hines.

Pay and allowances; effective date of retirement of Navy officer.

Decided December 1, 1941, following the decisions in *Butler* v. *United States*, 91 C. Cls. 88, and similar cases; plaintiff entitled to recover. Opinion 95 C. Cls. 156.

Upon a report from the General Accounting Office showing the amount due under the opinion of the court, judgment for the plaintiff in the sum of $3,114.06 was rendered on April 6, 1942.

No. 43970. JUNE 1, 1942

Arthur A. Ageton.

Pay and allowances; lieutenant in Navy with dependent mother; rental allowance while on sea duty.

Decided March 2, 1942; plaintiff entitled to recover. Opinion 95 C. Cls. 718.

Upon a report from the General Accounting Office showing the amount due in accordance with the findings and opinion of the court, judgment was entered for the plaintiff in the sum of $1,464.08.

JUDGMENTS ENTERED UNDER THE ACT OF JUNE 25, 1938

In accordance with the provisions of the Act of June 25, 1938, on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the recommendation of a commissioner in each case recommending that judgment be entered in favor of the plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

ON MAY 4, 1942

No. 44405, Boeing Aircraft Company, a corporation	$34, 978. 41

ON JUNE 1, 1942

No. 44176, Al-Lon Manufacturing Company, a corporation	$2, 522. 67
No. 44308, Cowden Manufacturing Company, Inc., a compromise	3, 962. 62
No. 44480, Horner Woolen Mills Company	5, 390. 31
No. 44481, Horner Woolen Mills Company	1, 743. 37

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON APRIL 6, 1942

42474. John C. Fulmer.
44079. Catoctin Farms, Inc.
45301. Alameda City Land Co.
45436. Federal Motor Truck Co.

ON MAY 4, 1942

43806. Ford Motor Company.
43886. American Natural Gas Company.
43897. Robert M. Schwartz et al.
43967. Irving Trust Company, Inc.
44773. First National Pictures, Inc.
44774. Warner Bros. Pictures, Inc.
45411. Monroe State Savings Bank.
45542. United Elastic Corporation.

ON JUNE 1, 1942

43705. Pan American Petroleum and Transport Company.
43706. Huasteca Petroleum Company.
43707. Mexican Petroleum Company of California.
45159. Pacific Mutual Life Insurance Co.
45558. Lykes Bros. Steamship Company.
45565. Isabelle H. Bonbright, Executrix, etc.

ON JUNE 2, 1942

On the authority of St. Louis Refrigerating & Cold Storage Company (No. 43110) 95 C. Cls. 694; Fulton Market Cold Storage Company (No. 43336) 95 C. Cls. 710.

43337. Central Warehouse Company.
43450. Ralph S. Lane.
43730. Produce Terminal Cold Storage Company.
43731. Central Cold Storage Company.
43732. Booth Cold Storage Company.
43733. Western Refrigerating Company.
43734. Upton Cold Storage Company.
43735. Tech Food Products Company.
43736. Minnesota Refrigerating Company.
43737. Heermance Storage & Refrigerating Company.
43738. New Orleans Cold Storage & Warehouse Co. Ltd.
43739. Union Storage Company.

43740. Greenwich Refrigerating Co.
43741. Northern Cold Storage & Warehouse Company.
43742. Booth Cold Storage Company.
43743. Central Cold Storage Corp.
43756. United States Warehouse Co.
43757. Central Railway Terminal and Cold Storage Co., Inc.
43758. Quaker City Cold Storage Co.
43759. Merchants Terminal Corporation.
43760. Industrial Cold Storage and Warehouse Company.
43761. Fur Merchants Cold Storage Co.
43762. Lehigh & New England Terminal Warehouse.
43763. Diamond Ice & Storage Company.
43764. Midwest Cold Storage Company.
43765. Scobey Fireproof Storage Co.
43766. Kent Storage Company.
43767. Stevenson Refrigerating & Storage Company, Inc.
43768. Winchester Cold Storage Company.
43769. Springfield Cold Storage Co.
43770. Rochester Ice & Cold Storage Utilities, Inc.
43771. Fairport Storage & Ice Corp.
43774. Jones Cold Storage and Terminal Corporation.
43775. Duluth Terminal & Cold Storage Company, etc.
43776. Brockport Cold Storage Co., Inc.
43777. General Storage & Ice Company.
43778. Union Storage & Transfer Co.
43779. Merchants Ice & Cold Storage Company.
43780. Memphis Cold Storage Warehouse Company.
43797. Parsons Cold Storage Co.
43798. Williamson Storage & Ice Co.
44652. The Manhattan Refrigerating Company.

ON JUNE 6, 1942

45460. Deaver Dry Goods Company.

ON JUNE 27, 1942

44749. J. P. Seeburg Corporation.
45219. O. E. Canfield, et al.
45234. J–R Ranches, a Corporation.
45550. Cream of Wheat Corporation, a Corporation.

ON JUNE 30, 1942

45078. Vi-Jon Laboratories, Inc., a Corporation.
45591. Loveman's, Inc.
45592. Loveman's, Inc.

Cases Involving Increased Costs Under N. I. R. A. Act

Cases under the Act of June 25, 1938, in which petitions were dismissed:

ON APRIL 6, 1942

44097. Francis F. Boyle.
44316. H. Meirejohan, et al.
44447. Sternberg Dredging Company.

ON MAY 4, 1942

44346. Gray Knox Marble Company.
44357. Walter H. Tinney.

ON JUNE 6, 1942

44443. M. E. Gillioz.

Cases Involving Indian Claims

ON JUNE 1, 1942

44301. Menominee Tribe of Indians.
44302. Menominee Tribe of Indians.

Case Involving Government Contracts

ON APRIL 6, 1942

45437. Massachusetts Electric Construction Company, Inc.

Miscellaneous

ON APRIL 6, 1942

45176. Beaumont Farms, Inc.

ON MAY 4, 1942

45265. The Kendall Company.



REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

May 1, 1942, to December 31, 1942, inclusive.

THE SEMINOLE NATION, PETITIONER, v. THE UNITED STATES

[No. L-51]

[93 C. Cls. 500; 316 U. S. 286]

Certiorari to review a judgment of the Court of Claims January 6, 1941, relating to certain claims of the Seminole Nation against the United States growing out of various treaties, agreements, and acts of Congress; the petition being dismissed.

The judgment of the Court of Claims was *reversed*, May 11, 1942, with the exception of the disposition of Items One, Three, and Four of petitioner's claim which was in all respects affirmed, and the entire cause was remanded to the Court of Claims with directions to make further findings with respect to Items Two and Five; to determine the additional liability of the Government, if any, thereon; and to find and designate the particular gratuitous expenditures to be offset against the Government's total liability.

The Supreme Court decided:

1. A claim against the Government by the Seminole Nation, based on Article VIII of the Treaty of August 7, 1856, whereby the Government undertook to provide a certain sum annually for ten years, to be used for specified purposes, but which, in the amount claimed, was diverted to the clothing and feeding of refugee Indians, *held* to have been released by Article VIII of the Treaty of March 21, 1866, and properly disallowed by the Court of Claims.

2. Payment by the Government to the tribal treasurer of the Seminole Nation, of certain amounts which, by Article III of the Treaty of 1866, the Government agreed to pay for the support of schools, satisfied the obligation of the Treaty and defeats recovery, whether payment to the tribal treasurer was authorized or not, since the schools actually received the benefit of the payments.

3. Under section 11 of the Act of April 26, 1906, a sum due under Article III of the Treaty of 1866, was in 1907 properly paid by the Government to the United States Indian Agent for the Seminoles.

4. A provision in Article VI of the Treaty of 1866, whereby the Government undertook to construct at a cost not exceeding $10,000 "suitable agency buildings" on the Seminole reservation, *held* not breached.

5. In respect of a claim of the Seminole Nation based on the Government's obligation, under a provision of Article VIII of the Treaty of 1856, to establish a trust fund in a specified amount and to pay the interest therefrom to the members of the Seminole Nation per capita as an annuity, *held:*

(a) The Court of Claims properly deducted the amount of overpayments found to have been made by the Government in certain years.

(b) Under the Act of 1906, which was not repealed by the jurisdictional act, payments in 1907, 1908, and 1909 were properly made to the United States Indian Agent for the Seminoles.

(c) As to payments made from 1870 to 1874 directly to the tribal treasurer and to designated creditors, pursuant to requests of the Seminole General Council, the Court of Claims should have made findings, since the issue was material, as to whether the General Council, during the years in question was corrupt, venal, and false to its trust; whether, if such were the fact, it was known to the administrative officers of the Government charged with the disbursement of Indian moneys; and whether the Seminole Nation received the benefit of any of the payments. This branch of the case is remanded to the Court of Claims in order that the essential findings of fact may be made.

6. Certain payments made by the Government to the tribal treasurer of the Seminole Nation, after the passage of the Curtis Act of June 28, 1898, *held* not to have contravened section 19 of that Act, since that section forbade only payments to tribal officers which were to be distributed by them to individual members of the

tribe. However, this branch of the case also is remanded to the Court of Claims for further findings as to whether from 1899 to 1907 tribal officers were mulcting the Seminole Nation; if so, whether administrative officers of the Government disbursing moneys to the Seminoles had knowledge thereof; and whether the Seminole Nation received the benefit of payments made to the tribal treasurer.

7. In respect to amounts which were expended gratuitously by the Government for the benefit of the Seminole Nation, and which, under Act of August 12, 1935, may be offset against the Government's liability, *held* that the Court of Claims should find and designate the precise expenditures to be used as offsets, instead of finding generally all the items which the Government may ever be entitled to use.

The opinion of the Supreme Court was delivered by Mr. Justice Murphy, with Mr. Justice Jackson dissenting. Mr. Justice Reed took no part in the consideration or decision of this case.

The opinion of the Supreme Court is as follows:

This suit to adjudicate certain claims of the Seminole Nation against the United States growing out of various treaties, agreements, and acts of Congress is now before us for the second time. After we reversed, 299 U. S. 417, for want of jurisdiction in the Court of Claims a previous judgment of that court awarding the Seminole Nation $1,317,087.27,[1] the jurisdictional barrier was removed by statute,[2] and the Seminole Nation then filed a second amended petition in the Court of Claims, reasserting the six items of claim previously denied by this Court on jurisdictional grounds.[3] The Court of Claims thereupon disallowed three items in their entirety, allowed one in full and allowed the remaining two in part, deciding that the Seminole Nation was entitled to $18,388.30, against which the United States was entitled to gratuity offsets in the amount of $705,-

[1] 82 C. Cls. 135.

[2] The Act of August 16, 1937, c. 651, 50 Stat. 650, conferred jurisdiction on the Court of Claims to reinstate and retry on the merits claims of the Five Civilized Tribes previously dismissed because set up by amended petition after the expiration of the time limit fixed in the respective jurisdictional acts.

[3] Seven items, amounting to $1,307,478.02, were considered by this Court in 299 U. S. 417. As to six of those items it was concluded that no jurisdiction existed in the Court of Claims, and no decision on the merits of those claims was expressed. The seventh item was examined on its merits and disallowed in large part. 299 U. S. 417, 431.

337.33.[4] Accordingly, the second amended petition was ordered dismissed.[5] We granted certiorari on a petition challenging the correctness of the decision below on each of the five items disallowed in whole or in part, and as to numerous items which the court included in its list of gratuity offsets.

I

We are of opinion that petitioner, the Seminole Nation, is entitled to no additional allowance on Items One, Three, and Four of its claim.

Item One.

This item is a claim for $61,563.42, based on Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702, whereby the Government promised the Seminole Nation:

"to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops . . ."

The Court of Claims found that Congress annually made the necessary appropriation of $7,200 to discharge this obligation during the fiscal years from 1858 to 1867, inclusive; that only $10,436.58 was actually expended for the purposes specified in the Treaty; and that the balance ($61,563.42) was diverted and disbursed by the Government prior to June 30, 1866, for the purpose of clothing and feeding refugee and destitute Indians driven from their homes during the Civil War because of their loyalty to the Union.

Petitioner's claim to the diverted balance was properly disallowed because petitioner released its claim by Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759, which provides:

"The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion,

[4] The Act of August 12, 1935, c. 596, 49 Stat. 571, 596, 25 U. S. C., sec. 475a, provides in part:

"In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; . . ."

[5] 93 C. Cls. 500.

and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six."

It is unnecessary to consider petitioner's contention that by this Article it did not ratify the diversions in question because they were made from the funds of the United States and not from funds of the Seminole Nation. The first sentence of Article VIII of Treaty of 1866, quoted above, constitutes a release to the United States of all expenditures of annuities diverted for the purpose of clothing and feeding refugee Indians. There is no requirement that the annuities there referred to must be derived "from the funds of the Seminole nation," and there is no indication that the releases contained in the first sentence of Article VIII are dependent upon the ratification contained in the second sentence. The payments due the Seminole Nation under Article VIII of the Treaty of 1856 clearly come within the scope of the release—being annual payments, they were annuities, and they were diverted for the purpose of clothing and feeding refugee Indians.

Item Three.

This claim for $61,347.20 grows out of Article III of the Treaty of 1866 in which the Government agreed to establish a $50,000 trust fund for the Seminole Nation and to pay thereon annual interest of 5% ($2,500) for the support of schools.

During the period from 1867 to 1874 the Government only partially discharged this annual obligation, disbursing only $16,902.80 of the $20,000 appropriated for that purpose. It is here undisputed that, as the Court of Claims held, petitioner is entitled to the deficiency of $3,097.20.

The Court of Claims correctly disallowed the balance of this Item. During the twenty-three years from 1875

to 1898 the annual payments, amounting in all to $57,500, were paid directly to the tribal treasurer. Since that official disbursed annually not less than $2,500 in excess of amounts he was otherwise obligated to expend for the maintenance of schools,[6] there is no need to inquire whether payment to that official was authorized. The schools actually received the benefit of the money. That satisfied the obligation of the Treaty and defeats recovery.

The remainder of this Item, $750, was paid to the United States Indian Agent for the Seminoles in 1907. Such payment was proper under Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141,[7] and nothing in the applicable jurisdictional act[8] indicates any intention on the part of Congress to override or repeal the Act of 1906.

Item Four.

The Government agreed in Article VI of the Treaty of 1866 to construct, "at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings" on the Seminole reservation. In 1870 and 1872, $931.76 was expended for agency buildings and repairs. Petitioner's claims for the difference of $9,068.24 between this sum and $10,000 is without merit. In 1872 Congress appropriated $10,000 to fulfill this treaty obligation;[9] $9,030.15 of this appropriation was expended for some undisclosed purpose, as only $969.85 was returned to surplus. The Court of Claims found that an agency building was erected on the Seminole reservation in 1873.[10] Petitioner makes no claim that the building erected was unsuitable. Since the Government's prom-

[6] Petitioner does not question this finding of the Court of Claims. See Annual Reports of the Commissioner of Indian Affairs: 1876, pp. 212–213; 1877, pp. 690–691; 1878, pp. 286–287; 1879, pp. 341–342; 1881, pp. 280–281; 1883, pp. 90, 250–251; 1884, pp. 270–271; 1886, pp. 146, 154; 1887, pp. 98, 110; 1888, pp. 113, 122; 1890, pp. 89, 94; 1891, pp. 240, 250; 1892, pp. 247, 256; 1893, pp. 143, 147; 1894, p. 140; 1895, pp. 155, 161; 1896 pp. 151–158.

[7] "That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. . . ."

[8] Act of May 20, 1924, c. 162, 43 Stat. 133, as amended by 44 Stat. 568, 45 Stat. 1229, and 50 Stat. 650.

[9] Act of May 18, 1872, c. 172, 17 Stat. 122, 132.

[10] See Report of the Commissioner of Indian Affairs for 1873, pp. 211–212.

ise was not to expend $10,000, but to erect suitable buildings at a cost not in excess of $10,000, it follows that there was no violation of the treaty provision, and hence no right of recovery.

II

With respect to Items Two and Five we are of opinion that the cause must be remanded to the Court of Claims for further material findings of fact.

Item Two.

This is a claim for $154,551.28 based on one of the provisions of Article VIII of the Treaty of 1856, namely, the Government's promise to establish a $500,000 trust fund (originally two funds of $250,000 each), the annual interest therefrom ($25,000) to be paid over to the members of the Seminole Nation per capita as an annuity. The findings of the Court of Claims show that although Congress appropriated $25,000 annually for each of the fiscal years in controversy (1867–1898, 1907–1909), the Government did in fact fail to make direct per capita disbursements of a portion of the funds appropriated in 1867–1874, 1876, and 1879, the underpayments for those years totalling $92,051.28, and that one-half the appropriation in 1907 and the entire appropriation in 1908 and 1909 ($62,500 in all), instead of being paid directly to the individual Seminoles, was paid to the United States Indian Agent for the Seminole Nation.

The Court of Claims reduced petitioner's claim for $154,551.28, based on these underpayments and alleged mispayments, to $13,501.10, allowing the Government three set-offs, consisting of (a) overpayments of $12,127.54 made in 1875, 1877, 1880, 1882, and 1883; (b) payment of $62,500 made to the United States Indian Agent for the Seminoles in 1907, 1908, and 1909; and (c) payments of $66,422.64 made pursuant to requests of the Seminole General Council during the period from 1870 to 1874.

The overpayments were rightly deducted, cf. *Wisconsin Central Rd.* v. *United States*, 164 U. S. 190, and petitioner does not contend otherwise. Nor is petitioner entitled to any part of the $62,500 paid directly to the Indian Agent, for such payments were proper under the Act of 1906, 34 Stat. 137, 141, which, as pointed out in the discussion of Item Three, *ante*, was not repealed by the jurisdictional act, 43 Stat. 133.

There is thus left for consideration only the payments from 1870 to 1874 made pursuant to requests of the Seminole General Council and totalling $66,422.64; of this amount $37,500 was paid directly to the tribal treasurer, and the remaining $28,922.64 to designated creditors.

The Government contends that since those payments were made at the request of the tribal council, the governing body of a semiautonomous political entity, possessing the power to enter into treaties and agreements with the United States, the tribe is not now entitled to receive payment a second time, and that, despite the fact that the Treaty of 1856 provided that the payments were to be made per capita for the benefit of each individual Indian, these payments at the request of the General Council discharged the treaty obligation because the agreement was one between the United States and the Seminole Nation and not one between the United States and the individual members of the tribe.

The argument for the Government, however sound it might otherwise be, fails to recognize the impact of certain equitable considerations and the effect of the fiduciary duty of the Government to its Indian wards. The jurisdictional act, 43 Stat. 133, expressly confers jurisdiction on the Court of Claims to adjudicate "all legal and equitable claims," arising under treaty or statute, which the Seminole Nation may have against the United States, and the second amended petition avers:

"That since the passage of the Act of April 15, 1874, it was reported by the officers of the defendant [the United States] that the Seminole tribal officials were misappropriating the Seminole tribal funds entrusted to them, and robbing the members of the tribe of an equal share of the tribal income. That the reports of the Dawes Commission show conclusively that the governments of the Five Civilized Tribes were notoriously and incurably corrupt, that every branch of the service was infested with favoritism, graft and crookedness, and that by such methods the tribal officers acquired large fortunes, while the other members entitled to share in the tribal income received little benefit therefrom."

It is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary. Cf. *Duncan* v. *Jaudon*, 15 Wall, 165; *Manhattan Bank* v. *Walker*, 130 U. S. 267. See Bogert, Trust and Trustees (1935), vol. 4, secs. 901,

955; Scott, Trusts (1939), vol. 3, sec. 321.1; American Law Institute, Restatement of the Law of Trusts (1935), sec. 321. The Seminole General Council, requesting the annuities originally intended for the benefit of the individual members of the tribe, stood in a fiduciary capacity to them. Consequently, the payments at the request of the Council did not discharge the treaty obligation if the Government, for this purpose the officials administering Indian affairs and disbursing Indian moneys, actually knew that the Council was defrauding the members of the Seminole Nation.

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. E. g. *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1; *United States* v. *Kagama*, 118 U. S. 375; *Choctaw Nation* v. *United States*, 119 U. S. 1; *United States* v. *Pelican*, 232 U. S. 442; *United States* v. *Creek Nation*, 295 U. S. 103; *Tulee* v. *State of Washington*, 315 U. S. 681, No. 318 this Term. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress[11] and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursements of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.[12] If those were the circum-

[11] There is no better example of this than the facts of the instant case. Despite the lapse of time and the bar of the statute of limitations, Congress authorized the Court of Claims to adjudicate all legal and equitable claims, arising under statute or treaty, which the Seminole Nation may have against the United States. And after an adverse decision by this Court on jurisdictional grounds, 299 U. S. 417, Congress again removed the bar. 50 Stat. 650.

[12] As was well said by Chief Judge (later Mr. Justice) Cardozo in *Meinhard* v. *Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 546:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

stances, either historically notorious so as to be judicially noticed or otherwise open to proof, when the $66,422.64 was paid over at the request of the Seminole General Council during the period from 1870 to 1874, the Seminole Nation is entitled to recover that sum, minus such amounts as were actually expended for the benefit of the Nation by the Council.

Having formulated the proper rule of law, we must examine the facts of this case. Although the Court of Claims had jurisdiction of this issue, for such an action for breach of fiduciary duty growing out of treaty obligations is clearly an equitable claim within the meaning of the jurisdictional act, 43 Stat. 133, the court did not consider, and hence made no findings on this issue. We think the issue material. During the period in question, 1870–1874, the administration of Indian affairs and the disbursement of Indian moneys were lodged with the Department of the Interior. The Commissioner of Indian Affairs, under the general supervision of the Secretary of the Interior, actively supervised these matters.[13] There are ample indications in the record before us that the Seminole General Council was mulcting the Nation and that the proper Government officials may well have had knowledge thereof at the time some, at least, of the payments were made. For about this time the Commissioner of Indian Affairs received several warnings from his subordinates that "injustice to the majority" of the Seminoles existed,[14] that the chiefs were in the habit "of taking out what amount they

[13] See R. S. secs. 441, 444, 445, 463, 464, 2089. Cf. Act of April 15, 1874, c. 97, 18 Stat. 29.

[14] On December 6, 1869, the United States Indian Agent for the Seminoles wrote to the Commissioner of Indian Affairs as follows:

"I would state that they are in the habit of calling Councils, for any little thing that may arise, and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation [Seminole], except in expending the funds; which are taken out of those ordered paid per 'capita' to the nation.

"I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making return to the department, upon rolls as if it had been paid per 'capita.'

"I think that it is an injustice to the majority of the people, comprising this nation and the only way to avoid the unnecessary expenditure of money for Councils, etc., which are of but little benefit to the nation (for example the last council held cost the nation $700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what amount shall be turned over to the chiefs and the balance paid to heads of families in person."

chose" from the annuities,[15] that the Seminoles were "in bad hands",[16] and that the chiefs intended "to 'gobble' the next money for the purpose of keeping up their government".[17] And the Acting Commissioner of Indian Affairs was evidently aware in 1872 of the possibility that the Council was faithless for he declined to change the method of payment at the request of the Seminole Chiefs "until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner proposed by the Chiefs."[18]

We do not say that all this establishes liability on the part of the Government for it is not our function, in reviewing judgments of the Court of Claims, to make basic findings of fact. When the Court of Claims fails to make findings on a material issue, it is proper to remand the case for such findings. Cf. *Universal Bat-*

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[15] In his annual report to the Commissioner of Indian Affairs, dated September 1, 1870, the United States Indian Agent for the Seminoles said:

"*Per capita* payments are, in some instances, I think, a great evil; but as the system cannot be abolished, this nation [Seminole] having no constitutional government, and until such a form of government be adopted, I would recommend that the provisions of the treaty be rigidly enforced, and no moneys allowed to be paid except to the heads of families. Heretofore, as I have reported, the chiefs have been in the habit of taking out what amount they chose, allowing the balance to be paid *per capita*. This is an injustice, as few receive the bulk of their annuities." Report of the Secretary of the Interior, 41st Cong., 3d Sess. (1870–71), vol. 1, pp. 766–767.

[16] The report of John P. C. Shanks, Special Commissioner, to the Commissioner of Indian Affairs, dated August 9, 1875, states:

"These claims are enormous in amount, and show too clearly that the Seminoles are in bad hands. These parties who had these claims (except Harjo, who is an assignee) are or have been officials in the Nation. Robert Johnson is a Negro, and is interpreter to the Chief; Chupco is present chief; John Jumper was former chief; James Factor, a half breed, is treasurer; E. J. Brown is a white man, formerly U. S. Indian Agent of the Seminole Nation, since has had the address to procure his admission as a member of the tribe.

"These men have evidently stood together in the wrong, of procuring such allowances, and did stand together in refusing to relinquish the claims, or a part of them, except a deduction for present payment upon claims which did not bear interest."

[17] On November 20, 1878, special agent Meacham wrote the Commissioner of Indian Affairs that "Some of the Band Chiefs are tyrants and despots, holding their people under abject fear and in some instances of actual servitude." The letter also referred to the intention of the Chiefs "to 'gobble' the next money for the purpose of keeping up their government."

[18] On January 5, 1872, the Acting Commissioner of Indian Affairs wrote the United States Indian Agent for the Seminoles:

"In reply to your letter of the 20 Dec. last, and to the request of the Seminole Chiefs that their National funds be hereafter paid to the Treasurer of the Nation instead of per capita, I have to say that it is not deemed advisable to change the manner in which payment of annuities to these Indians has heretofore been made until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner proposed by the Chiefs."

tery Co. v. *United States*, 281 U. S. 580, 584–585. We do think, however, that the matter outlined above was sufficient to require the Court of Claims to make findings on this material issue, that is, findings as to whether the Seminole General Council, during the years 1870 to 1874, was corrupt, venal, and false to its trust; whether the appropriate Government officials charged with the duty of administering Indian affairs and disbursing funds to the Seminoles knew of that corruption, venality, and faithlessness, if such in fact existed, when any of the payments in question were made at the request of the Council; and, if so, whether the Nation received the benefit of any of those payments. Accordingly, this phase of the case must be remanded so that the Court of Claims can consider such relevant evidence and other data as may be brought to its attention, make the necessary findings of fact, and thus determine whether this case fits into the rule which we have enunciated.

Item Five.

This is a claim for the moneys, $864,702.58 in all, paid to the Seminole tribal treasurer after the passage of the Curtis Act of June 28, 1898, c. 517, 30 Stat. 495, 502. The payments were made during the fiscal years 1899 to 1907 and consisted of the following items: (a) $212,500 paid to discharge the per capita obligation under Article VIII of the Treaty of 1856 (see Item Two *ante*); (b) $29,750 paid to discharge the obligation of Article III of the Treaty of 1866 providing for the support of schools (see Item Three, *ante*) and for the support of the Seminole Government; (c) $622,156.87 paid pursuant to Section 12 of the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, providing for the payment of interest at five per centum per annum on $1,500,000 "to be paid semi-annually to the treasurer of said nation"; and, (d) $295.71, the "proceeds of labor."

Section 19 of the Curtis Act, 30 Stat. 495, 502, provides: "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

Petitioner insists that this section prohibited the Government from making the payments in question to the Seminole treasurer, and that it is entitled to recover the sums illegally so paid.

Assuming, without deciding, that Section 19 is applicable to the Seminole Nation and that an action could be brought by the Nation for payments made in violation thereof, there can be no recovery here because none of the payments contravened Section 19. The text of that section and its legislative history demonstrate that it prohibits only payments to tribal officers which are "for disbursement"—i. e., payments to be distributed by them to members of the tribe. If the first clause of Section 19 is construed as prohibiting all payments to the tribe or its officers, then the later clauses, providing only for payments to members and per capita payments, are inadequate to dispose of the problems raised by the first clause. For then no provision is made for the expenses of maintaining and conducting the tribal government, despite the fact that the Seminole tribal government was not only to continue after the Curtis Act but was in fact relieved of the necessity of securing Presidential approval of its legislation [19] by an agreement ratified three days after the passage of that statute. See 30 Stat. 567, 569. Section 19, as originally introduced in the House, provided that payments of "all expenses incurred in transacting their business" were to be made under the direction of the Secretary of the Interior.[20] The deletion of this clause is persuasive that Congress intended that tribal officers should retain the right to disburse their funds for the expenses of their respective tribal governments. For these reasons we think Section 19 prohibits payment by the Government to the tribal treasurer only when such payments are to be distributed by him to members of the tribe. It has no application to money earmarked for educational or tribal purposes, and money intended for any purpose the tribe may designate.

[19] Act of June 7, 1897, c. 3, 30 Stat. 62, 84.

[20] Section 19, as originally introduced, was as follows:

". . . that no payments of any moneys, on any account whatever, be made to any of the tribal governments or to any officer thereof for disbursement, but payments of *all expenses incurred in transacting their business and of* all sums to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation." [Italics supplied.] H. R. 8581, 55th Cong., 31 Cong. Rec. 3869.

None of the payments in question were for disbursement to the individual members of the Seminole Nation. While the sum of $212,500 was paid pursuant to Article VIII of the Treaty of 1856, and while that obligation was originally an annuity payable per capita to the individual Seminoles, the character and purpose of this interest payment were by agreement changed into a payment for the benefit of the Seminole Nation itself, and this before the payment of the $212,500 from 1899 to 1907. The Act of April 15, 1874, c. 97, 18 Stat. 29, authorized the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President, to pay this annuity into the treasury of the Seminole Nation, provided $5,000 was annually appropriated out of the annuity by the General Council for the school fund, and provided "that the consent of said tribe to such expenditures and payment shall be first obtained." By act of the Seminole General Council on April 2, 1879, the Seminole Nation accepted the provisions of the Act of 1874, and consented that all annuities due or to become due under Article VIII of the Treaty of 1856 should be paid into the Seminole treasury, to be used as the tribal council should provide. This was a consensual conversion of the Government's obligation from payments to individuals to payments to the tribe, and Section 19 of the Curtis Act is inapplicable to the $212,500 paid pursuant to this converted agreement.

While none of the payments were in violation of Section 19 of the Curtis Act and there can therefore be no recovery on that score, the Government is not necessarily relieved of all liability for this $864,702.58 claim. There remains for consideration the fiduciary duty of the Government, as discussed in Item Two, *ante*. During this period, 1899 to 1907, as from 1870 to 1874, the Secretary of the Interior and the Commissioner of Indian Affairs supervised Indian matters and the disbursement of Indian moneys. Apparently, it was the practice of the Department of the Interior to deposit the Seminole funds with the Assistant Treasurer of the United States at St. Louis to the credit of the tribal treasurer; the Indian agent for the Five Civilized Tribes did not disburse the Seminole payments although he did distribute moneys to the other tribes.[21] Shortly before the payments in question were made the Commission to the

[21] Letter of Assistant Attorney General Van Devanter to the Secretary of the Interior, dated July 12, 1898; H. Doc. vol. 23, 57th Cong., 1st Sess. (1901–1902), p. 231.

Five Civilized Tribes [22] pointedly described in its annual reports to the Secretary of the Interior and Congress the unbridled corruption of the various tribal governments, without singling out any particular government for unenviable distinction. Thus:

"Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available." [23]

And again:

"The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect." [24]

While these warnings were of a general nature, specific complaints of misgovernment, venality, and fraudulent conduct on the part of the Seminole leaders were brought to the attention of the Secretary of the Interior and the Commissioner of Indian Affairs. By a letter to the Secretary of the Interior, dated January 24, 1898, certain Seminoles remonstrated against the ratification of the agreement concluded with the Seminole leaders on December 16, 1897. The remonstrance alleged misgovernment and the participation by these leaders in a land swindle at the expense of the tribe. The Secretary laid

[22] Commonly known as the Dawes Commission. It was created by the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, to negotiate with the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles for the extinguishment of tribal titles to lands, the allotment of their lands in severalty, and the division of their funds equally among the members of those tribes.

[23] Report dated November 20, 1894, Appendix B, H. Ex. Doc., vol. 14, 53d Cong., 3d Sess. (1894–95), p. LXVIII. See also pp. LXIX–LXX.

[24] Report dated November 18, 1895, Exhibit A. H. Doc., vol. 14, 54th Cong., 1st Sess. (1895–96), p. XCV. See also pp. LXXXVII, XCIII–XCIV.
And see report dated October 11, 1897, Exhibit B, H. Doc., vol. 12, 55th Cong., 2d Sess. (1897–98), pp. CXIX, CXXI.

this protest before Congress.[25] During much of the period in question, 1899–1907, and for some time prior thereto, two half-breed brothers were principal chief and treasurer, respectively, of the Seminole Nation. Together they ran a trading store in the Seminole country and extended credit by giving due bills, good only in trade at their store, to individual Seminoles in the amount of annuities or other payments owing those individuals. The activities of these brothers, and their system of credit in particular, were attacked on the floor of Congress in 1896 and 1897,[26] and severely criticized by an investigator for the Department of Justice in 1905, part of whose report was set forth in a letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, dated November 11, 1905.[27]

[25] See S. Doc. 105, 55th Cong., 2d Sess. (1898), pp. 2–4. This remonstrance stated in part:

"There was the sum of $191,294.20 which never entered the treasuries of the United States or the Seminoles. The reply given us about the disposition of this money by our authorities was that during the transfer of these lands to the United States there was a lawyer who negotiated the agreement and took that amount for his pay. The name of the lawyer was never mentioned and no receipt of the alleged deal was ever shown. We call your attention to this. We ask that you take note of the town-site laws of Wewoka and see to whom only these laws are beneficial and whom they oppress. . . .

"We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and according to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. . . . We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. . . ."

[26] See 28 Cong. Rec. 2070; 29 Cong. Rec. 1261.

[27] This report stated in part:

"It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner."

Wm. L. Bowie, Special Investigator for the Interior Department, reported to the Superintendent for the Five Civilized Tribes in 1916 that:

"Governor Brown and his brother have been in the mercantile business in the Seminole Nation for many years. It is a fact much commented upon by those acquainted with Seminole tribal affairs, that for a number of years Governor Brown held the dual relationship to the members of the Seminole tribe of governor and paymaster on the one hand, and Indian trader on the other hand."

". . . In my opinion Governor Brown has shown in his transactions with John Smith and Lizzie Yahola, that he has little regard for the welfare and

All this tends to show that the Seminole tribal officers might have been faithless to their trust during the period in question, and that the Government officials administering Indian affairs and disbursing Seminole funds might have been aware of that faithlessness at the time payments were made to the Seminole treasurer. Here again the Court of Claims did not address itself to, and made no findings on, this material issue. As we said in the discussion of Item Two, *ante*, it is not our function to make basic findings of fact. Again we do not say that the showing with respect to this Item establishes breach of the Government's fiduciary obligation, but we are of opinion that it is sufficient to justify remanding this branch of the case to the Court of Claims for further findings, in the light of such evidence as may be brought to its attention, as to whether the Seminole tribal officers were mulcting the Nation from 1899 to 1907; whether, if such were the case, the appropriate Government officials administering Indian affairs and disbursing moneys to the Seminoles had knowledge thereof at the time any of the payments to the tribal treasurer were made; and, if so, whether the Seminole Nation received the benefit of any sums expended by the tribal treasurer. On the basis of these findings the Court of Claims can then determine whether there was a breach of the Government's fiduciary obligation, as defined in the discussion of Item Two, *ante*, and if there was a breach, the resultant liability.

III

Petitioner asserts that the Court of Claims committed numerous errors with respect to the items which it included in the list of gratuitous offsets, and the Government admits that the court erred in a few instances. However, since the case must be remanded to determine whether the Government has any further obligation on

protection of Indians in general, and it is unfortunate that he occupies a position which enables him by reason of the confidence placed in him as such official to impose upon them."

On the basis of reports from subordinates Assistant Commissioner of Indian Affairs Merrit recommended to the Commissioner of Indian Affairs, by a letter dated July 20, 1916, that the Seminole tribal government be abolished as "the only way to prevent Brown and Crain from continuing to use their official positions to advance their personal interests at the expense of the Indians under their authority."

Items Two and Five, we deem it unnecessary to consider in detail the challenged offsets.

One phase of this question does require attention. In *Seminole Nation* v. *United States*, No. 830 this Term, decided today, petitioner asserted that the Court of Claims gave the Government credit there for an offset which it had employed in the instant case, thus allowing a double credit. To avoid this confusion the Court of Claims should find and designate the precise gratuitous expenditures to be offset against the Government's liability, instead of finding generally all the items which the Government may ever be entitled to use. Gratuity offsets resemble a fund in a bank, to be drawn upon by the Government in successive Indian claims cases until exhausted. Since they may be needed in future cases, it becomes important to know precisely what items have been employed to extinguish liability in a particular case, as the instant case and No. 830 demonstrate. The disadvantage of the alternative, to treat as binding in subsequent suits involving the same parties the findings of the Court of Claims that the Government has total offsets in a certain amount, is evident because it may require this Court to do a vain thing, that is, to examine offsets which might never be needed and which, even if disapproved, would not change the result reached by the Court of Claims.

The judgment below is reversed, with the exception of the disposition of Items One, Three and Four which is in all respects affirmed, and the entire cause is remanded to the Court of Claims with directions to make further findings with respect to Items Two and Five; to determine the additional liability of the Government, if any, thereon; and, to find and designate the particular gratuitous expenditures to be offset against the Government's total liability.

Upon the remand the Court of Claims will be free to consider any legal or equitable defenses which the Government may interpose to the claims asserted there by petitioner.

So ordered.

Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice JACKSON dissents.

Petition for rehearing denied June 8, 1942.

THE SIOUX TRIBE OF INDIANS, PETITIONER, v. THE UNITED STATES

[No. C-531-(8)]

[94 C. Cls. 150; 316 U. S. 317]

Certiorari to review a judgment of the Court of Claims, April 7, 1941, holding that the addition of certain lands by Executive orders of the President to the permanent reservation of the Sioux Tribe did not give to the said tribe such title to said additional lands as they had to the permanent reservation acquired by treaty.

The judgment of the Court of Claims was *affirmed*, May 11, 1942, the Supreme Court deciding:

1. Orders of the President, in 1875 and 1876, withdrawing areas of public lands from sale and settlement and setting them apart for the use of the Sioux Indians as additions to their permanent treaty reservation, conveyed no interest to the tribe for which it was entitled to compensation from the United States when, by subsequent Executive orders, the lands were restored to the public domain.

2. Since the Constitution places the authority to dispose of public lands exclusively in Congress, the Executive's power to convey any interest in these lands must be traced to congressional delegation of its authority.

3. The basis of decision in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long-continued congressional acquiescence in the executive practice.

4. The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the Executive and Congress to flow from the establishment of Executive order reservations.

5. There was no express constitutional or statutory authorization for the conveyance of a compensable interest to the tribe by the Executive orders of 1875 and 1876, and no implied congressional delegation of the power to do so can be inferred from the evidence of congressional and executive understanding.

6. The inclusion of Executive order reservations in the provisions of the General Allotment Act for allotting

reservation land to Indians in severalty, did not amount to a recognition of tribal ownership of the land prior to allotment.

The opinion of the Supreme Court was delivered by Mr. Justice Byrnes, as follows:

This is an action to recover compensation for some 5½ million acres of land allegedly taken from the petitioner tribe in 1879 and 1884. The suit was initiated under the Act of June 3, 1920 (41 Stat. 738) permitting petitioner to submit to the Court of Claims any claims arising from the asserted failure of the United States to pay money or property due, without regard to lapse of time or statutes of limitation. The Court of Claims denied recovery (94 C. Cls. 150) and we brought the case here on certiorari (315 U. S. 790).

The facts as found by the Court of Claims are as follows:

In 1868 the United States and the Sioux Tribe entered into the Fort Laramie Treaty (15 Stat. 635). By Article II of this treaty a certain described territory, known as the Great Sioux Reservation and located in what is now South Dakota and Nebraska, was "set apart for the absolute and undisputed use and occupation" of the Tribe. The United States promised that no persons, other than government officers and agents discharging their official duties, would be permitted "to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians." For their part, the Indians relinquished "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid." No question arises in this case with respect to the lands specifically included within the Reservation by this treaty.

The eastern boundary of the Great Sioux Reservation, as constituted by the Ft. Laramie Treaty, was the low water mark on the east bank of the Missouri River.[1] The large tract bordering upon and extending eastward from the east bank of the river remained a part of the public domain open to settlement and afforded easy access to the Reservation. As a result great numbers of white men "infested" the region for the purpose of engaging in the liquor traffic. Anxiety over this development led the Commissioner of Indian Affairs on

[1] The Great Sioux Reservation also included two small theretofore existing reservations located on the east bank of the river. They are of no consequence so far as the present dispute is concerned.

January 8, 1875, to suggest to the Secretary of the Interior that he request the President to issue an Executive order withdrawing from sale and setting apart for Indian purposes a certain large tract of the land along the eastern bank of the Missouri River. In the Commissioner's letter to the Secretary of the Interior, and in the latter's letter of January 9th to the President, the reason advanced for the proposed Executive order was that it was "deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri River." On January 11, 1875, the President signed the suggested order. It described the territory affected and provided that it "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation." On two occasions thereafter, once in February and again in May, white persons who had settled on the land in question prior to the issuance of the Executive order and who feared that its effect was to deprive them of their holdings, were informed by the Commissioner of Indian Affairs that the object of the Executive order was "to enable the suppression of the liquor traffic with the Indians on the Missouri River," that it did not affect the existing rights of any persons in the area, that it was not "supposed that the withdrawal will be made permanent," and that no interference with the peaceful occupancy of the territory had been intended.

On March 13, 1875, the Commissioner of Indian Affairs addressed another letter to the Secretary of the Interior. In it he recommended that the Secretary request the President to withdraw from sale and set apart for Indian purposes another tract of land bordering the Great Sioux Reservation, this time to the north and northeast. The reason given was similar to that for which the first order had been sought: "viz: the suppression of the liquor traffic with Indians at the Standing Rock Agency." As a "further reason for said request" the Commissioner stated that "the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by [the Fort Laramie] treaty . . . but are included in the tract proposed to be withdrawn." The Secretary forwarded the Commissioner's report to the President with his concurrence, repeating that the "enlargement of the Sioux reservation in Dakota" was "deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency." On March 16, 1875, the President issued a second Executive order describing the tract of land involved and declar-

ing that it "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation in said Territory."

In mid-May of 1875 the Secretary of War transmitted to the Secretary of the Interior a letter from the officer in command of the Southern District of the Military Department of Dakota in which it was pointed out that a small tract of land along the eastern bank of the Missouri River opposite the southern corner of the Sioux Reservation was still open to settlement and afforded "a very nice point for whiskey sellers and horse thieves." Upon the basis of this letter, the Commissioner recommended to the Secretary of the Interior and the Secretary recommended to the President the issuance of still a third Executive order withdrawing the described tract from settlement. On May 20, 1875, the Executive order was issued in the same form as its two predecessors.

Finally upon a similar complaint from the Acting Agent of the Standing Rock Agency that a small piece of land to the north of the reservation was being used as a base of operations by persons selling liquor and ammunition to the Sioux Indians, the Commissioner of Indian Affairs and the Secretary of the Interior recommended a further order to "effectually cut off these whiskey dealers." In his letter to the Secretary dated November 24, 1876, the Commissioner stated: "It is not proposed to interfere with the vested rights, or the legitimate business of any settler who may be upon this tract." The President issued a fourth Executive order in the usual form on November 28, 1876. On December 13, 1876, the Commissioner notified the agent at Standing Rock that the order had been issued, and added that it was "not intended to interfere with the vested rights of any settler upon the tract or with the legitimate business pursuits of any person lawfully residing within its limits."

About two and a half years after the last of these four Executive orders withdrawing lands from sale and setting them apart for the use of the Sioux, the Commissioner of Indian Affairs submitted to the Secretary of the Interior a report upon a suggestion that the orders be modified so as to permit the return of the lands to the public domain. The report, dated June 6, 1879, reviewed the problems arising from the liquor trade during the years following the Fort Laramie treaty, recalled that the purpose of the four Executive orders

of 1875 and 1876 had been to eliminate this traffic, observed that they had "to a great extent accomplished the object desired, viz: the prevention of the sale of whiskey to the Indians," and concluded that any change in the boundaries established by the Executive orders would "give renewed life to this unlawful traffic, and be detrimental to the best interests of the Indians."

Three weeks later, however, upon reconsideration, the Commissioner informed the Secretary that in his opinion the lands included in the Executive orders of 1875 and 1876 might be "restored to the public domain, and the interests of the Indians still be protected." In explanation he stated:

"These lands were set apart for the purpose, as alleged, of preventing illegal liquor traffic with the Indians. At the time said lands were set apart there was no law providing a punishment for the sale of liquor to Indians, 'except to Indians in the Indian country', but, by the Act of February 27, 1877 (19 Stat. 244), persons who now engage in liquor traffic with Indians, no matter in what locality, are liable to a penalty of $300, and two years imprisonment, and, therefore, the necessity for so large a reservation for the protection of these Indians in this respect does not now exist."[2]

Accordingly, he recommended that the lands withdrawn from sale by the President in 1875 and 1876 be returned to the public domain with the exception of three small tracts directly opposite the Cheyenne, Grand River, and Standing Rock agencies. On August 9, 1879, an executive order to this effect was promulgated and the land with the exceptions indicated was "restored to the public domain." Five years later the Commissioner informed the Secretary that the Grand River Agency had ceased to exist and that the agents at Cheyenne and Standing Rock considered it no longer necessary to withhold the tracts opposite their agencies from the public domain "for the purpose for which they have thus far been retained." Consequently, an executive order was prepared and signed by the President on March 20, 1884, restoring these three small pieces of land to the public domain, "the same being no longer needed for the purpose for which they were withdrawn from sale and settlement."

One additional event remains to be noted. In the Indian Appropriation Act for 1877, approved August 15, 1876 (19 Stat. 176, 192), Congress provided:

[2] Letter from Commissioner to Secretary of the Interior, dated June 27, 1879.

". . . hereafter there shall be no appropriation made for the subsistence of said Indians [i. e., the Sioux] unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight [the Fort Laramie treaty] for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude [the western boundary set by the Fort Laramie treaty had been the 104th meridian], and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River . . ."

On September 26, 1876—a date subsequent to the first three of the four Executive orders setting apart additional lands for the use of the Sioux, but about two months prior to the last of those orders—the Sioux Tribe signed an agreement conforming to the conditions imposed by Congress in the Indian Appropriation Act and promised to "relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described. . . ."[3]

Petitioner's position is that the Executive orders of 1875 and 1876 were effective to convey to the Tribe the same kind of interest in the lands affected as it had acquired in the lands covered by the Fort Laramie Treaty, that the Executive orders of 1879 and 1884 restoring the lands to the public domain deprived petitioner of this interest, and that it is entitled to be compensated for the fair value of the lands as of 1879 and 1884. The government defends on several grounds: *first*, that in general the President lacked authority to confer upon any individual or group a compensable interest in any part of the public domain; *second*, that even if he had the power to convey such a compensable interest, the President did not purport to do so in this case; and *third*, that in any event by the treaty of 1876 the Sioux relinquished whatever rights they may have had in the lands covered by the first three of the four executive orders.

Section 3 of Article IV of the Constitution confers upon Congress exclusively "the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Nevertheless, "from an early period in the

[3] This treaty was ratified by the Act of February 28, 1877 (19 Stat. 254)

history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Grisar* v. *McDowell*, 6 Wall. 363, 381. As long ago as 1830 Congress revealed its awareness of this practice and acquiesced in it.[4] By 1855 the President had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations.[5] From that date until 1919,[6] hundreds of reservations for Indian occupancy and for other purposes were created by executive order. Department of the Interior, *Executive Orders Relating to Indian Reservations, passim; United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469–470. Although the validity of these orders was occasionally questioned,[7] doubts were quieted in *United States* v. *Midwest Oil Co.*, *supra*. In that case it was squarely held that even in the absence of express statutory authorization, it lay within the power of the President to withdraw lands from the public domain. Cf. *Mason* v. *United States*, 260 U. S. 545.

The government therefore does not deny that the executive orders of 1875 and 1876 involved here were effective to withdraw the lands in question from the public domain. It contends, however, that this is not the issue presented by this case. It urges that instead we are called upon to determine whether the President had the power to bestow upon the Sioux Tribe an interest in these lands of such a character as to require compensation when the interest was extinguished by the Executive orders of 1879 and 1884. Concededly, where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Klamath Indians*, 304 U. S. 119. Since the

[4] The Pre-emption Act of May 29, 1830, excluded from its provisions "any land which is reserved from sale by Act of Congress, or by order of the President." 4 Stat. 420, 421. "Lands included in any reservation by any treaty, law, or proclamation of the President" were excluded from the operation of the Pre-emption Act of September 4, 1841. 5 Stat. 453, 456.

[5] Cohen, *Handbook of Federal Indian Law* (1941) 299; Department of the Interior, Executive Orders Relating to Indian Reservations, Vol. I, p. 79.

[6] By § 27 of the Act of June 30, 1919, Congress declared that thereafter "no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise for or as an Indian reservation except by Act of Congress." 41 Stat. 3, 34. In 1927 Congress added a provision that any future changes in the boundaries of executive order reservations should be made by Congress alone. § 4, 44 Stat. 1347.

[7] See 14 Op. A. G. 181 (1873). But *cf.* 17 Op. A. G. 258 (1882).

Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority. The basis of decision in *United States* v. *Midwest Oil Co.* was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long continued congressional acquiescence in the executive practice. The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the executive and Congress to flow from the establishment of executive order reservations.[8]

It is significant that the executive department consistently indicated its understanding that the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations. The annual reports of the Commissioner of Indian Affairs during the years when reservations were frequently being established by executive order contain statements that

[8] This question is an open one. It is true that language appearing in two decisions of this Court suggests that the tribal title to a reservation is the same whether the reservation has been created by statute or treaty or by executive order. Re Wilson, 140 U. S. 575, 577; Spalding *v.* Chandler, 160 U. S. 394, 403. Cf. C. N. Cotton, 12 L. D. 205 (1890); William F. Tucker et al., 13 L. D. 628 (1891). In re Wilson, however, it was conceded by all concerned that an executive order reservation was "Indian country" within the meaning of that term as it appeared in certain statutes defining the criminal jurisdiction of United States courts and territorial courts. No question was raised by the case with respect to the character of the tribe's interest in the reservation. Moreover, the dictum referred to was based upon the assumption that the Allotment Act of 1887 (24 Stat. 388) amounted to a Congressional recognition of tribal title to executive order reservations. The invalidity of this assumption is demonstrated in a later portion of our opinion. The issue in Spalding *v.* Chandler concerned the effect of the Pre-emption Act of September 4, 1841 (5 Stat. 453) upon an Indian reservation created by treaty and preserved by executive order and did not involve a determination of whether the Indians enjoyed a compensable interest in an executive order reservation. And twenty-eight years thereafter when the Attorney General ruled, on the authority of United States *v.* Midwest Oil Co., that executive order reservations were not a part of the public domain for purposes of the General Leasing Act of 1920 (41 Stat. 437), he took occasion to remark: "Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (12 L. D. 205; 13 L. D. 628) and not without strong reasons; for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the General Allotment Act. Nevertheless, the President has in fact, and in a number of instances, changed the boundaries of executive order Indian reservations by excluding lands therefrom, *and the question of his authority to do so has not apparently come before the courts.*" 34 Op. A. G. 171, 176 (emphasis added).

the Indians had "no assurance for their occupation of these lands beyond the pleasure of the Executive,"[9] that they "are mere tenants at will, and possess no permanent rights to the lands upon which they are temporarily permitted to remain,"[10] and that those occupying land in executive order reservations "do not hold it by the same tenure with which Indians in other parts of the Indian Territory possess their reserves."[11]

Although there are abundant signs that Congress was aware of the practice of establishing Indian reservations by executive order, there is little to indicate what it understood to be the kind of interest that the Indians obtained in these lands. However, in its report in 1892 upon a bill to restore to the public domain a portion of the Colville executive order reservation, the Senate Committee on Indian Affairs expressed the opinion that under the executive order "the Indians were given a license to occupy the lands described in it so long as it was the pleasure of the Government that they should do so, and no right, title, or claim to such lands has vested in the Indians by virtue of this occupancy."[12]

Petitioner argues that its position finds support in Section 1 of the General Allotment Act of February 8, 1887,[13] which provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and, he hereby is, authorized . . . to cause said reservation . . . to be surveyed . . . and to allot the lands in said reservation in severalty to any Indian located thereon . . ."

By Section 5 provision was made for issuance of patents to the allottees by which the United States promised to hold the lands in trust for the allottees and their heirs for 25 years and thereafter to convey to them full title. Petitioner urges that by including executive order reservations within the provisions of this Act, Congress revealed

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[9] Annual Report of Commissioner of Indian Affairs (1872), H. R. Exec. Doc., 42d Cong., 3d Sess., Vol. III, No. 1, part 5, p. 472.

[10] *Id.* (1878), H. R. Exec. Doc., 46th Cong., 3d Sess., Vol. IX, No. 1, part 5, p. 486; *id.* (1880), H. R. Exec. Doc., 46th Cong., 3d Sess., Vol. IX, No. 1, part 5, p. 96.

[11] *Id.* (1886), H. R. Exec. Doc., 49th Cong., 2d Sess., Vol. 8, No. 1, part 5, p. 88.

[12] S. Rep. No. 664, 52d Cong., 1st Sess., p. 2.

[13] 24 Stat. 388.

its belief that the degree of ownership enjoyed by Indian tribes is identical whether the reservation is created by treaty, statute, or executive order. But there is much to contradict this interpretation. For example, during the course of the debate on the measure Senator Dawes, a member of the Committee reporting the bill, frequently distinguished between the character of title enjoyed by the Indians on statute and treaty reservations and that enjoyed by those on executive order reservations, and no exception was taken to his remarks. 17 Cong. Rec. 1559, 1630, 1631, 1763. Moreover, in its 1892 report on the bill to abolish a portion of the Colville reservation, to which we have referred, the Senate Committee on Indian Affairs explained:

"An erroneous idea seems to have grown up, that the Indian allotment act [of 1887] and its amendments have given additional sanctions to executive reservations, and operated to confer titles upon the Indians occupying them they did not before possess. . . . At the time of the enactment of this statute, there were fifty-six executive reservations, embracing perhaps from 75,000,000 to 100,000,000 acres of the public lands, in which the Indians had no right or claim of title and which could be extinguished by act of the President. It would be preposterous to place such a construction upon the language of this act as would divest the United States of its title to these lands." [14]

This statement by the Committee which reported the general Allotment Act of 1887, made within five years of its passage, is virtually conclusive as to the significance of that Act. We think that the inclusion of Executive order reservations meant no more than that Congress was willing that the lands within them should be allotted to individual Indians according to the procedure outlined. It did not amount to a recognition of tribal ownership of the lands prior to allotment. Since the lands involved in the case before us were never allotted—indeed, the Executive orders of 1879 and 1884 terminated the reservation even before the Allotment Act was passed,—we think the Act has no bearing upon the issue presented.

Perhaps the most striking proof of the belief shared by Congress and the Executive that the Indians were not entitled to compensation upon the abolition of an Executive order reservation is the very absence of com-

[14] S. Rep. No. 664, 52d Cong., 1st Sess., p. 2.

pensatory payments in such situations. It was a common practice during the period in which reservations were created by Executive order for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it. That is to say, the procedure followed in the case before us was typical. No compensation was made, and neither the government nor the Indians suggested that it was due.[15] It is true that on several of the many occasions when Congress itself abolished Executive order reservations, it provided for a measure of compensation to the Indians. In the Act of July 1, 1892, restoring to the public domain a large portion of the Colville reservation[16] and in the Act of February 20, 1893 restoring a portion of the White Mountain Apache Indian Reservation,[17] Congress directed that the proceeds from the sale of the lands be used for the benefit of the Indians. But both acts contained an explicit proviso: "That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said . . . Reservation, whether that hereby restored to the public domain or that still reserved by the government for their use and occupancy." Consequently, the granting of compensation must be regarded as an act of grace rather than a recognition of an obligation.

We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four Executive orders of 1875 and 1876 and that no implied Congressional delegation of the power to do so can be spelled out from the evidence of Congressional and Executive understanding. The orders were effective to withdraw from sale the lands affected and to grant the use of the lands to the petitioner. But the interest which the Indians received was subject to termination at the will of either the Executive or Congress and without obligation to the United States. The Executive orders of 1879 and 1884 were simply an exercise of this power of termination and the payment of compensation was not required. *Affirmed.*

The CHIEF JUSTICE took no part in the consideration or decision of this case.

[15] See, *e. g.*, Department of the Interior, *Executive Orders Relating to Indian Reservations*, Vol. 1, pp. 5, 6, 21, 30, 37, 43, 44, 48–50; Hearings before a Subcommittee of the Committee on Indian Affairs on S. 1722 and S. 3159, 69th Cong., 1st Sess., pp. 104–105.

[16] 27 Stat. 62, 63.

[17] 27 Stat. 469, 470.

THE UNITED STATES, PETITIONER, v. THE NUNNALLY INVESTMENT COMPANY

[No. 42389]

[92 C. Cls. 358; 93 C. Cls. 778; 313 U. S. 584; 314 U. S. 702; 316 U. S. 258]

Certiorari to review a judgment of the Court of Claims, January 6, 1941, holding that the plaintiff was not precluded from recovery of a refund of 1920 taxes based on issues not involved in a prior case against the Collector of Internal Revenue in the United States District Court.

The judgment of the Court of Claims was *affirmed* May 11, 1942, the Supreme Court deciding:

1. A judgment for a refund of income taxes in a suit against the Collector is not a bar to a later suit against the United States for an additional refund of income taxes for the same year, paid to the same collector. *Sage* v. *United States*, 250 U. S. 33.

2. The taxpayer sold all its assets for a consideration consisting of cash and the assumption by the purchaser of certain obligations including federal taxes for previous years. The purchaser paid part of these taxes in 1920, and the remainder in 1921 and 1922. In determining a deficiency for 1920, the Commissioner used a lower basis of the assets sold than was used by the taxpayer and included in the selling price the full amount of the taxes which the purchaser had assumed. The taxpayer, having paid, sued the Collector and recovered a refund based upon the Commissioner's understatement of the basis of the assets sold. *Held*, that the judgment against the Collector did not bar a suit against the United States claiming further refund on the ground that the taxes assumed by the purchaser which were not paid in 1920 were not taxable as income of that year.

The opinion of the Supreme Court was delivered by Mr. Justice Frankfurter, with a dissenting opinion by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Byrnes.

Mr. Justice Jackson took no part in the consideration or decision of this case.

The opinion of the Supreme Court is as follows:

This is a suit against the United States to recover taxes for the year 1920. In that year the taxpayer, the

respondent here, sold its business and all its assets to another corporation. The consideration consisted of cash and the assumption of certain of the respondent's obligations, including federal taxes for previous years. The purchaser paid part of these taxes in 1920, the remainder in 1921 and 1922. In determining a deficiency for the year 1920, the Commissioner employed a lower basis of the assets sold than was used by the respondent. The Commissioner computed the selling price by including the full amount of taxes which the purchaser agreed to assume. After paying the assessed tax, the respondent filed a claim for refund, alleging only that the Commissioner had understated the basis of the assets sold. In due course a suit was brought against the Collector in the District Court. A settlement was reached under which judgment for the taxpayer was entered. In accordance with their agreement, neither party appealed.

Thereafter, the respondent filed a second refund claim, asserting that the taxes assumed by the purchaser which were not paid in 1920 were not taxable to the respondent in that year. This claim was rejected, and a suit against the United States was begun in the Court of Claims. Holding that the judgment against the Collector in the District Court was not res judicata of the taxpayer's claim in this suit against the United States, the Court of Claims (with one judge dissenting) gave judgment for the respondent. (92 C. Cls. 358.) 36 F. Supp. 332. In view of the importance of this question in the administration of the federal income tax law and its relation to the decision in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, we brought the case here. (314 U. S. 702.)

Nearly a quarter-century ago in *Sage* v. *United States*, 250 U. S. 33, this Court upon full consideration announced the doctrine that the United States is a "stranger" to a judgment resulting from a suit brought against a collector, and that such a judgment is, therefore, not a bar in a subsequent action upon the same claim against the United States. This was not a novel doctrine. The result was drawn from the conception of a suit against a collector as "personal," since he was personally responsible for illegally exacting monies under the claim that they were due as taxes. Such a "personal" remedy against the collector, derived from the common-law action of *indebitatus assumpsit*, has always been part of our fiscal administration. Unless the application given to this remedy by the doctrine of the *Sage* case has

been displaced by Congress or renounced by later decisions of this Court, the judgment must stand. Concededly Congress has not done so. And although recognition has been made of the technical nature of a suit against a collector, no support can be found for the contention that the *Sage* doctrine has been discarded as an anachronism. On the contrary, the rule has been reaffirmed in an unbroken line of authority.

Soon after the decision in the *Sage* case, the question was presented whether an action against a collector could be continued against his successor. This Court held that it could not, because the *Sage* case had settled that such a suit was "personal." See *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Union Trust Co.* v. *Wardell*, 258 U. S. 537. In *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, a suit against a collector with respect to taxes for the years 1914–1919 had resulted in a determination that the taxpayer was entitled to a depletion allowance of five cents per ton on coal mine royalties. It was contended that this determination was res judicata of that issue in a subsequent action against the Commissioner relating to taxes for later years. The Court, again relying on the *Sage* case, rejected the argument in these words: "With respect to this contention it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not *res adjudicata* against the Commissioner or the United States." 287 U. S. at 311–312.

The Government leans heavily upon *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373. In that case the constitutionality of § 1014 of the Revenue Act of 1924, 43 Stat. 253, 343, providing that a taxpayer may recover an unlawful federal tax even though he paid the tax without protest, was upheld as applied to a payment without protest made prior to the enactment of the provision. In reaching this conclusion, the Court noted that under R. S. § 989, 28 U. S. C. § 842, a collector who acts under the directions of the Secretary of the Treasury, or other proper officer of the Government, "is entitled as of right to a certificate converting the suit against him into one against the Government . . . A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a

remedy shall exist, though he has been guilty of no wrong and though another is to pay . . . There may have been utility in such procedural devices in days when the Government was not suable as freely as now . . . They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court." 289 U. S. at 381–83.

The Government urges that even though the *Moore Ice Cream* case was not concerned with the conclusiveness of a judgment in a suit against the collector, its rationale undermined the *Sage* doctrine. But such has not been the influence of the *Moore Ice Cream* case on the subsequent course of decisions relevant to our purpose. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, decided by a unanimous Court three weeks after the decision in the *Moore Ice Cream* case, is incontrovertible proof that the *Sage* doctrine was left unimpaired. The Court there held that a judgment in a suit against the Commissioner was binding in a subsequent action against the United States and the collector. The doctrine in the *Sage* case was explicitly reaffirmed: "In a suit for unlawful exaction the liability of a collector is not official but personal. *Sage* v. *United States*, 250 U. S. 33; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, 311. We think, however, that where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment." 289 U. S. at 627.

More recently, in *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, where the principle of res judicata was applied to suits to which an administrative agency was a party, the Court again expressly adhered to the doctrine of the *Sage* case: "Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (*Sage* v. *United States*, 250 U. S. 33; *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S.

308) are not in point, since the suit against the collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.'" 310 U. S. at 403. And earlier in this term in *United States* v. *Kales*, 314 U. S. 186, in speaking of the right of a taxpayer to maintain separate suits against a collector and the government for tax payments made to two collectors on income derived from a single transaction in a single tax year, the Court said: "The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. See *Sage* v. *United States*, *supra*; *Smietanka* v. *Indiana Steel Co.*, *supra*, 4, 5. While the statutes have for most practical purposes reduced the personal liability of the collector to a fiction, the course of the legislation indicates clearly enough that it is a fiction intended to be acted upon to the extent that the right to maintain the suit and its incidents, until judgment rendered, are to be left undisturbed. . . . The right to pursue the common law action against the collector is too deeply imbedded in the statutes and judicial decisions of the United States to admit of so radical a departure from its traditional use and consequences as the Government now urges, without further Congressional action." 314 U. S. at 199–200.

In summary, therefore, an imposing series of opinions has fortified the original authority of the *Sage* doctrine. No doubt the precise question raised in each of these cases was different from the one now before us, and each case might have been decided without reference to the principles underlying the rule in the *Sage* case. But this only serves to emphasize the obduracy of the doctrine as part of the historical scheme of revenue administration. It would have been easy in all of these cases to dissipate the force of the doctrine which the *Sage* case represents by rejecting it and resting the decision in that case upon the alternative ground afforded by the Act of July 27, 1912, c. 256, 37 Stat. 240. That this long line of cases should have referred to and relied upon the *Sage* case without rejecting the doctrine for which it was cited only underlines still further its persistence.

Even when this Court found that the common-law right to sue the collector had argumentatively been with-

drawn, see *Cary* v. *Curtis*, 3 How. 236, Congress promptly restored that right. Act of February 26, 1845, c. 22, 5 Stat. 727. The problem of legal remedies appropriate for fiscal administration rests within easy Congressional control. Congress can deal with the matter comprehensively, unembarrassed by the limitations of a litigation involving only one phase of a complex problem. The Government itself does not now ask us to jettison the whole notion of suing a collector personally. It merely asks us to eliminate one consequence of that conception. In the field of custom duties Congress has devised a comprehensive and interrelated scheme of administrative and judicial remedies. See Act of June 17, 1930, 46 Stat. 590, 734, 19 U. S. C. §§ 1514–15; Freund, Administrative Powers over Persons and Property, pp. 553–60. If the doctrine of the *Sage* case is now to be abandoned, such a determination of policy in the administration of the income tax law should be made by Congress, which maintains a Joint Committee on Internal Revenue Taxation charged with the duty of investigating the operation of the federal revenue laws and recommending such legislation as may be deemed desirable. Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice BYRNES dissent for the reasons (1) that here, unlike the situation in *United States* v. *Kales*, 314 U. S. 186, the taxpayer had but a single cause of action and could have raised every issue with respect to the validity of the taxes in the earlier suit; (2) that here, unlike the situation in *Sage* v. *United States*, 250 U. S. 33, 38–39, there had been no intervening legislation which created rights and lifted the bar of the judgment in the earlier suit; and (3) that in the earlier suit the United States became "a party to the judgment as a matter of law" (Griswold, Res Judicata in Federal Tax Cases, 46 Yale L. Journ. 1320, 1342) since in these days the presence of the collector as a defendant who acts "in the line of duty" is "merely a remedial expedient for bringing the Government into court." *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 383.

THE SEMINOLE NATION, PETITIONER, v. THE UNITED STATES

[No. L–208]

[94 C. Cls. 240; 316 U. S. 310]

Certiorari to review a judgment of the Court of Claims, May 5, 1941, holding that the plaintiff was not entitled to recover for an alleged shortage in the original reservation granted to the Seminole Nation by the treaty of March 21, 1866.

The judgment of the Court of Claims was *reversed* by the Supreme Court, May 11, 1942, and the cause remanded to the Court of Claims, the Supreme Court deciding:

1. The acquisition from the Creek Nation and the transfer to the Seminole Nation, by the United States in 1882, of a 175,000 acre tract, *held* unrelated to an alleged deficiency in a tract previously transferred to the Seminoles pursuant to Article III of the Treaty of March 21, 1866, since at the time of the 1882 transfer no suggestion of a deficiency in the treaty grant had been advanced.

2. Under the Act of August 12, 1935, which, in the settlement of claims against the United States by an Indian tribe, authorized offsets of sums expended gratuitously by the United States for the benefit of the tribe, the Court of Claims is required to find the amount of the liability, if any, of the United States on the claim of the tribe, and to designate and find the exact amount of the gratuitous expenditures which may be utilized to extinguish, in whole or in part, that liability.

The opinion of the Supreme Court was delivered by Mr. Justice Murphy, with Mr. Justice Jackson dissenting. Mr. Justice Reed took no part in the consideration or decision of this case.

The opinion of the Supreme Court is as follows:

The question presented for decision is whether the United States remains under any obligation to the Seminole Nation with respect to Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, which provides in part:

". . . The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars. . . ."

Petitioner's claim is for just compensation for the alleged taking by the United States of an asserted deficiency in the tract granted by this Article.

Late in 1866, before the boundaries of the Seminole domain had been located, the Seminoles moved to what was assumed to be their treaty land.[1] The first survey of the line dividing the Creek and the Seminole territories, made by one Rankin, in 1868, under a contract with the Superintendent of Indian Affairs, was not approved by the Department of the Interior. In 1871 one Bardwell re-surveyed the dividing line and placed it seven miles west of the Rankin line. Two months later, at the direction of the Government, one Robbins ran the western boundary of the Seminole lands so as to include 200,000 acres from the Bardwell line. According to Robbins' calculations 200,000.03 acres were included between the Canadian river on the south, the north fork of the Canadian river on the north, the Bardwell line on the east and the Robbins line on the west. The Bardwell and Robbins surveys were both approved by the Secretary of the Interior on February 5, 1872.

[1] Although negotiations were in progress with the Creeks at time the Seminole treaty was made and a treaty was signed with them on February 6, 1866, the Creek treaty was not concluded until June 14, 1866. See 14 Stat. 785. The dividing line between the two halves of the Creek country was not settled until the Bardwell survey was approved in 1872.

Meanwhile, pursuant to Article I of the Treaty of February 27, 1867, 15 Stat. 531,[2] the Pottawatomie tribe selected a tract bounded "by the West line of the Seminole lands," and on November 9, 1870, the Secretary of the Interior approved that selection. In 1872, after the location of the Robbins line, the Pottawatomies occupied the territory immediately west of that line. Subsequently, the Government allotted and patented the lands west of the Robbins line to the Pottawatomies in severalty, or sold and patented them to settlers and turned the purchase price into the Treasury as public money.[3]

The Bardwell survey disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by the Seminoles, who had made substantial improvements on this land. In order that the Seminoles might retain the lands which they had improved, Congress authorized negotiations for the purchase of these lands east of the Bardwell line. Act of March 3, 1873, 17 Stat. 626. An agreement was entered into on February 14, 1881, with the Creek Nation whereby that Nation ceded land east of the Bardwell line to the United States, the agreement providing that the eastern boundary of the land ceded was to be drawn so that the tract would aggregate 175,000 acres. *Creek Nation* v. *United States*, 93 C. Cls. 561, 566. The Creeks received $175,000 for this tract. Act of August 5, 1882, 22 Stat. 257, 265. This land became a part of the Seminole domain and was disposed of either by allotment to members of the tribe or by sale for the account of the tribe.

[2] By that Article the United States agreed that a delegation from the Pottawatomies should accompany a government commission to the Indian country ". . . in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation."

[3] Provision was made for allotting the lands to the Pottawatomies in severalty by Act of May 23, 1872, 17 Stat. 159, and Act of February 5, 1887, 24 Stat. 388. By an agreement ratified by Act of March 3, 1891, 26 Stat. 989, 1016–1017, the Pottawatomies ceded to the Government the tract assigned to them. It was stipulated in the agreement that all allotments in severalty, made or to be made, should be completed and confirmed, and that other allotments in severalty could be made until February 8, 1891. The ratifying act provided that the remaining lands were to be opened to settlement as public lands. 26 Stat. 1026.

The possibility of a deficiency in the original 200,000 acre tract was first suspected in 1900.[4] By an amended petition filed in the Court of Claims in 1937 [5] the Seminole Nation alleged that owing to an error in the location of the Robbins line, the territory enclosed between the Robbins and Bardwell lines was 11,550.54 acres short of 200,000 acres, and that the United States took from the Seminoles 11,550.54 acres west of the Robbins line when the Government patented that land to individuals in 1892 and subsequent years. Judgment was prayed against the United States for value at the time of taking of the 11,550.54 acres, with interest at the rate of five percent per annum. The Court of Claims made no finding as to whether a shortage in fact existed in the tract between the Bardwell and Robbins lines but held that in any event the Seminole Nation was more than compensated for the alleged shortage by the Government's purchase for the Seminoles of 175,000 acres of land from the Creek Nation. The court also stated that even if petitioner were entitled to recover for any deficit in the 200,000 acre tract, the Government would be entitled to offset the value of the 175,000 acre tract as a gratuitous expenditure under the Act of August 12, 1935, 49 Stat. 571, 596, a value assumed to be far in excess of the value of whatever deficit there may have been. We granted certiorari because of the close connection between this case and *Seminole Nation* v. *United States*, No. 348 this Term, decided today.[6]

The judgment of the Court of Claims cannot be sustained on either of the grounds advanced.

The Government in this Court agrees to this proposition and suggests that the cause be remanded to the Court of Claims.

[4] Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, dated February 5, 1900.

Letter from the Acting Secretary of the Interior to the Commission to the Five Civilized Tribes, dated October 16, 1900.

[5] The original petition was filed in 1930. The amended petition was filed after the amendment to the jurisdictional act. 43 Stat. 133, as amended by 50 Stat. 650.

[6] Petitioner has here limited its claim to 10,351.82 acres, adopting the shortage given in the report, dated March 18, 1941, of Arthur D. Kidder, District Cadastral Engineer of the General Land Office, who surveyed the area after the original petition was filed.

I

Underlying the denial of recovery for any deficit in the 200,000 acre tract because petitioner was compensated therefor "fifteenfold" by the receipt of an additional 175,000 acres, is the theory that the acquisition of land by the Seminoles under the Treaty of 1866 and the acquisition of additional land to the east by transfer from the Creeks in 1882 were but two parts of an integral transaction, intended to give the Seminoles 200,000 acres of land and thus discharge the obligation of the Treaty of 1866. However, the facts do not support that theory for in 1882 the suggestion that a shortage existed in the supposed 200,000 acre tract between the Bardwell and Robbins lines had not yet been advanced. There was therefore no thought at the time the transfer of the 175,000 acre tract was made that the Government thereby fulfilled its treaty obligation by compensating the Seminoles for a deficiency in the original tract.

II

The Act of August 12, 1935, 49 Stat. 571, 596, directs the Court of Claims in suits by an Indian tribe or band "to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band." This language plainly requires the Court of Claims to find first that money is due from the United States, to consider then whether the United States has gratuitously spent sums for the benefit of the tribe and, if it finds such gratuitous expenditures, to offset them against the amount found due.

In allowing the gratuity offset here the Court of Claims fell short of complying with the requirements of the offset statute. There was no finding that the United States was under any liability to the Seminole Nation; the Court stated only that the value of the 175,000 acre tract was "far in excess of the value of whatever deficit there may have been." The shortcomings of this approach are evident. As we said in *Seminole Nation* v. *United States*, No. 348 this Term, decided today, gratuity offsets resemble a fund in a bank, to be drawn on by the Government as needed. If the Government owes nothing, it is entitled to a dismissal on that ground, and should not be compelled to use its gratuity offsets. If liability exists on the Government's part, the exact amount of gratuitous expenditures uti-

lized to extinguish that liability, in whole or in part, should be precisely found and designated. The Government should not be held to satisfy its liability by the use of gratuity expenditures in excess of the liability. Conversely, the Indian tribe is entitled to have an exact determination of the amount owed it by the United States in order that an amount of gratuity expenditures equal to the liability may be exhausted, or that, if the available offsets are insufficient, it receive a money judgment for the difference. Otherwise confusion and the possibility of a double credit for a single offset arise, as this case and No. 348 abundantly demonstrate. In the latter case a gratuity offset in the amount of $165,847.17 on account of the purchase of the 175,000 acre tract from the Creeks was allowed, and here the assumed value of that tract is the offset employed by the Court of Claims.

The judgment is reversed and the cause remanded to the Court of Claims with directions to consolidate it with No. 348; to determine whether a shortage exists in the 200,000 acre tract; to determine whether the Government is liable therefor, and the amount of such liability, if a shortage exists; and, to find and designate the precise gratuitous expenditures used to offset the total liability, if any, arising from this claim and from Items Two and Five of No. 348. Reversed.

Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice JACKSON dissents.

AMERICAN CHICLE COMPANY, PETITIONER, v. THE UNITED STATES

[Nos. 45209 and 45439]

[94 C. Cls. 699; 316 U. S. 450]

Certiorari to review a judgment of the Court of Claims, November 3, 1941, holding that where a domestic corporation owned all of the stock of certain Canadian subsidiaries, and received therefrom in 1936, 1937, and 1938 dividends which were included in its income as returned for taxation in its income tax returns for said years, and where said domestic

corporation in said returns claimed credit for taxes paid in Canada by said subsidiaries, to determine the taxpayer's correct credit under sections 131 (f) of the Revenue Acts of 1936 and 1938 for each of the taxable years 1936, 1937 and 1938, the amount of the foreign tax paid by said subsidiaries is to be multiplied by the ratio (1) between dividends received from and (2) accumulated profits of each subsidiary.

The judgment of the Court of Claims was *affirmed* by the Supreme Court, June 1, 1942, the Supreme Court deciding:

1. Under § 131 (f) of the Revenue Acts of 1936 and 1938, allowing to a domestic corporation in respect of dividends received from a foreign subsidiary, a tax credit of that proportion of "taxes paid" by the subsidiary which the amount of the dividend bears to the amount of the subsidiary's "accumulated profits" (i. e., its income less taxes thereon), the words "taxes paid" are properly construed as meaning so much of the subsidiary's taxes as are attributable to its "accumulated profits," or the same proportion of the total taxes which the accumulated profits bear to the total profits.

2. A change by the Commissioner of Internal Revenue in the administrative practice, to conform to the plain meaning of the Revenue Act, and operating prospectively, is not precluded by an antecedent administrative interpretation though of long standing.

The opinion of the Supreme Court was delivered by Mr. Justice Roberts, as follows:

This case involves the application of Section 131 (f) of the Revenue Acts of 1936 and 1938[1] which allows a tax credit to domestic corporations in respect of income received from foreign subsidiaries.

During the taxable years 1936, 1937, and 1938, the petitioner, a domestic corporation, received dividends from foreign subsidiaries of which it was sole stockholder. The subsidiaries paid taxes upon their earnings to the countries of their domicile. In its income tax returns the petitioner claimed the credit allowed by § 131 for the foreign taxes so paid. The Commissioner of Internal Revenue computed the credit at a less sum than that the petitioner claimed. The petitioner paid the resultant taxes and presented claims for refund, which were rejected. This action was brought in the Court of Claims for asserted overpayments.

[1] 49 Stat. 1648, 1696; 52 Stat. 447, 506; 26 U. S. C. § 131.

The sole matter in controversy is the proper method of arriving at the credit granted by § 131. That section permits a domestic corporation to credit against its tax the amount of income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country, with certain limits set by subsections (b) (1) and (2). The purpose of the provision, like that of its predecessor, § 238 of the Revenue Act of 1921,[2] is to obviate double taxation.[3]

Section 131 (f), dealing with taxes of a foreign subsidiary,[4] provides that, for the purpose of the section, a domestic corporation receiving dividends from such a subsidiary "in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid" by the subsidiary to a foreign country, "upon or with respect to the accumulated profits" of the subsidiary "from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits." "Accumulated profits" of the subsidiary are defined as "the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income."

The parties are in agreement as to the fraction to be used in calculating the proportion. The numerator is the dividends received by the parent. The denominator is the "accumulated profits" of the subsidiary. The dispute relates to the multiplicand to which the fraction is to be applied. The petitioner says it is the total foreign taxes paid by the subsidiary. The respondent says it is the taxes paid upon or with respect to the accumulated profits of the subsidiary; i. e., so much of the taxes as is properly attributed to the accumulated profits, or the same proportion of the total taxes which the accumulated profits bear to the total profits. The Court of Claims so held.[5] Since several decisions have gone the other way,[6] we granted certiorari.

If the language of the Revenue Act is to be given effect, the Government's view seems correct. The statute does not purport to allow a credit for a stated proportion of the total foreign taxes paid or the foreign taxes paid "upon or with respect to" total foreign profits, but for

[2] 42 Stat. 227, 258.

[3] Burnet *v.* Chicago Portrait Co., 285 U. S. 1.

[4] A foreign corporation of whose voting stock the taxpayer owns a majority.

[5] 94 C. Cls. 699; 41 F. Supp. 537.

[6] *F. W. Woolworth Co.* v. *United States*, 91 F. 2d 973; *International Milling Co.* v. *United States*, 89 C. Cls. 128, 27 F. Supp. 592; *Aluminum Co. of America* v. *United States*, 123 F. 2d 615.

taxes paid "upon or with respect to" the subsidiary's "accumulated profits," which, by definition, are its total taxable profits less taxes paid.

If, as is admitted, the purpose is to avoid double taxation, the statute, as written, accomplishes that result. The parent receives dividends. Such dividends, not its subsidiary's profits, constitute its income to be returned for taxation. The subsidiary pays tax on, or in respect of, its entire profits; but, since the parent receives distributions out of what is left after payment of the foreign tax,—that is, out of what the statute calls "accumulated profits," it should receive a credit only for so much of the foreign tax paid as relates to or, as the Act says, is paid upon, or with respect to, the accumulated profits.

Hence we think that, under the plain terms of the Act, the Commissioner and the court below were right in limiting the credit by the use as multiplicand of a proportion of the tax paid abroad appropriately reflecting the relation of accumulated profits to total profits of the subsidiary. But the petitioner insists that the legislative history and a long indulged administrative construction require us, in effect, to elide the phrase "upon or with respect to the accumulated profits" of the foreign subsidiary.

Section 240(c) of the Revenue Act of 1918 [7] allowed the domestic parent receiving dividends from a foreign subsidiary a credit for the same proportion of the taxes paid by the foreign corporation during the taxable year to any foreign country which the amount of the dividends received by the parent during the taxable year bore to the total taxable income of the subsidiary upon or with respect to which such taxes were paid.

This provision had the same object as § 131 of the Revenue Acts of 1936 and 1938; that is, to avoid double taxation. The difficulty with it was that it did not relate the credit to the accumulated profits or surplus of the subsidiary out of which the dividends were paid. Thus, if dividends were paid out of surplus earned in prior years, and it happened that the subsidiary paid no tax to the foreign country in the taxable year in question, the parent could claim no credit whatever. There were other eccentric results flowing from the provision of the Act of 1918.

In the Revenue Act of 1921 § 238 (e)[8] was the analogous section. The draftsman of the section stated to the Senate Committe in charge of the measure: "I rewrote the old provision, safeguarding it from some

[7] c. 18, 40 Stat. 1057, 1082.
[8] c. 136, 42 Stat. 227, 259.

abuses which it was open to and closing up some of the gaps that were in the old provision." Section 238 (e) is substantially the same as § 131 (f). The alterations of § 240 (c) of the Act of 1918 were made to permit identification of the accumulated profits of each taxable year out of which the dividends might have been paid and to give credit for a proportion of the subsidiary's taxes attributable to such accumulated profits.

The Chairman of the Senate Finance Committee indicated that the calculation of the proportion of foreign tax paid would be exactly the same as it had been under the 1918 Act. But this would be true only if the dividends were paid in a given year out of the prior year's earnings and taxes were paid in the same year in respect of the same prior year's earnings. The petitioner seeks in this case to apply the proportion provided by the 1918 Act; but this is to ignore the alterations made in that Act in 1921 which have ever since been retained. In Committee hearings and in Congressional Reports with respect to the purpose and effect of the changes wrought by the 1921 Act there were statements indicating an understanding that the credit was to be proportioned to the dividends made available to the parent in this country.

The Treasury made no regulation applicable to § 238 (e) of the Revenue Act of 1921. It provided a form for reporting the tax, which sanctioned the petitioner's method of computing the credit; and, from 1921 to 1930, the Commissioner calculated credits for foreign subsidiaries' taxes by that method. In 1930, however, the Treasury promulgated a new form which required the credit to be computed in the way the Commissioner did in the present case; and promulgated Regulations 77 under the Revenue Act of 1932, which, in Article 698, required the computation of the credit in the same manner. The regulations have since remained unchanged: See Regulations 103 §§ 19.131–3 and 19.131–8. Although the regulations definitely govern this case, and were made prior to the years in controversy, the petitioner insists that the antecedent administrative interpretation long in force renders it impossible for the Commissioner to promulgate a regulation changing for the future the earlier practice, even though the new regulation comports with the plain meaning of the statute. We think the contention cannot be sustained.[9]

The judgment is affirmed.

[9] *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90; *Helvering* v. *Reynolds*, 313 U. S. 428; *White* v. *Winchester Country Club*, 315 U. S. 32.

THE NEZ PERCÉ TRIBE OF INDIANS v. THE UNITED STATES

[No. K-107]

[95 C. Cls. 1; 316 U. S. 686]

Indian claims; treaties of June 11, 1855, and June 9, 1863; alleged failure to pay amounts due; duty of sovereign.

Decided October 6, 1941; plaintiff entitled to recover. Plaintiff's motion and defendant's motion for new trial overruled, January 5, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 25, 1942.

ENGINEERS' CLUB OF PHILADELPHIA v. THE UNITED STATES

[No. 44568]

[95 C. Cls. 42; 316 U. S. 700]

Excise tax; dues and initiation fees of members of social club; res judicata.

Decided February 2, 1942; petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court June 1, 1942.

PHILLIPS PIPE LINE COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44359]

[94 C. Cls. 462; 316 U. S. 679, 712]

Internal Revenue; taxation of crude petroleum; natural gasoline.

Decided October 6, 1941; petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 4, 1942.

Plaintiff's petition for rehearing *denied* by the Supreme Court June 1, 1942.

GUANTANAMO SUGAR COMPANY v. THE UNITED STATES

[No. 43851]

[94 C. Cls. 569; 316 U. S. 705]

Income and profits tax; different grounds in claim for refund and petition to Board; statute of limitations; recoupment.

Decided April 7, 1941; petition dismissed. On plaintiff's motion for new trial, said motion was allowed in part and overruled in part, November 3, 1941; findings were amended, and the dismissal of the petition was vacated and withdrawn, and judgment was entered for the plaintiff.

Plaintiff's petition for writ of certiorari was *denied* by the Supreme Court June 8, 1942.

EDMOND L. VILES v. THE UNITED STATES

[No. 45416]

[95 C. Cls. 591; 317 U. S. —]

Relief to persons erroneously convicted in Federal Courts.

Decided January 5, 1942; plaintiff's petition dismissed on defendant's plea to the jurisdiction of the Court of Claims. Plaintiff's motion for new trial overruled April 6, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 12, 1942.

RODEN COAL COMPANY, INC., PLAINTIFF, AND WALTER E. DOWNEY, AS RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, NEW YORK, INTERVENOR, v. THE UNITED STATES

[No. 44255]

[95 C. Cls. 219; 317 U. S. —]

Dredging of navigable channel; consequential damages to adjacent property; just compensation; taking of property.

Decided December 1, 1941; plaintiff's petition and petition of intervenor dismissed. Plaintiff's motion and intervenor's motion for new trial overruled February 2, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 12, 1942.

EASTERN BUILDING CORPORATION v. THE UNITED STATES

[Nos. 45222 and 45269]

[*Ante*, pp. 399, 438; 317 U. S. —]

Lease of post office premises; cancelation under the Act of March 3, 1885; retroactive effect of repealing statute.

Decided April 6, 1942; plaintiff's petitions dismissed.

Plaintiff's petitions for writs of certiorari *denied* by the Supreme Court October 12, 1942.

J. H. CRAIN AND R. E. LEE WILSON, JR., TRUSTEES OF LEE WILSON & COMPANY, A BUSINESS TRUST, v. THE UNITED STATES

[No. 45300]

[*Ante*, p. 443; 317 U. S. —]

Bankhead Cotton Act of 1934; tax exemption certificates; liability of Government; constitutionality.

Decided April 6, 1942; plaintiffs' petition dismissed.

Plaintiffs' petition for writ of certiorari *denied* by the Supreme Court October 19, 1942.

J. H. BRACKIN v. THE UNITED STATES

[Congressional No. 17766]

[*Ante*, p. 457; 317 U. S. —]

Bankhead Cotton Act of 1934; liability of Government in connection with tax exemption certificate pool.

Decided April 6, 1942; plaintiff's petition dismissed. Plaintiff's motion for new trial overruled June 1, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 19, 1942.

CONSUMERS PAPER COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44089]

[94 C. Cls. 713; 317 U. S. —]

Increased labor costs under National Industrial Recovery Administration Act.

Decided October 6, 1941. Plaintiff not entitled to recover under its Contract No. 1 and entitled to recover under its Contract No. 8; suit under the Act of June 25, 1938 (52 Stat. 1197).

Upon defendant's petition for writ of certiorari (granted March 2, 1942) the decision of the Court of Claims was, on October 26, 1942, *affirmed* by the Supreme Court by an equally divided court; no opinion being filed.

THE UNITED STATES, PETITIONER, v. FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

[No. 43269]

[95 C. Cls. 84; 317 U. S. —]

Certiorari to review a decision of the Court of Claims holding that under the provisions of contract for furnishing and installing plumbing, heating and ventilating equipment in a Government building the Government was liable to the contractor for excess costs incurred by reason of delay.

The decision of the Court of Claims was *reversed* on November 9, 1942, the Supreme Court deciding:

1. Where contract with the Government for installation of plumbing, heating and electrical equipment in veterans' hospital provided for liquidated damages for failure to complete work by time principal contract had been completed and contractor was absolved from payment of liquidated damages for delay if such delay resulted from several causes including "acts of Government," and Government reserved right to make changes which might interrupt the work, and Government changed site and altered specifica-

tions because of unexpected discovery of unsuitable soil conditions, and extended time of performance and waived any claim to liquidated damages; the delay in commencing construction did not constitute a "breach of contract" by the Government so as to entitle contractor to recover from Government damages due to such delay.

2. Government construction contracts whereby Government reserves right to make changes which may interrupt the work, and even to suspend any portion of construction if it is deemed necessary, do not bind the Government to have the property ready for work by a contractor at a particular time, as regards Government's liability for damages due to delay.

3. Under Government construction contract, if there are rights to recover damages where Government exercises its reserved power to delay construction, such rights must be found in particular provisions fixing the rights of the parties.

4. Where one clause of Government construction contract governed procedure under which Government might alter specifications of contract for general causes, and another clause governed procedure under which Government might alter contract to meet unanticipated physical conditions and incorporated by reference the same machinery of adjustment as that specified in former clause, questions of interpretation in such similar clauses should, if possible, be resolved in the same fashion in each of them.

5. The phrase "increase or decrease of cost," within Government construction contract clauses providing that, if changes are made affecting an increase or decrease of cost or affecting the length of time of performance, an equitable adjustment shall be made, is not broad enough to include damages for delay, since the phrase applies to changes in cost due to structural changes required by altered specifications and not to consequential damages which might flow from delay taken care of in the "difference in time" provision.

6. Under contract with Government for installation of plumbing, heating and electrical equipment in veterans' hospital, consequential damages resulting from delay in commencing construction made necessary by Government's change of site and alterations of specifications because of unexpected discovery of unsuitable soil condition were not recoverable under clause of contract which essentially provided that, if changes were made causing an increase or decrease of cost, or affecting the length of time of performance, an equitable adjustment should be made, where the Government extended the time of performance and waived

any claim to liquidated damages for the period of the extension.

Mr. Justice Black delivered the opinion of the Court, as follows:

We granted certiorari to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract in *Crook* v. *United States*, 270 U. S. 4.[a]

Respondent agreed to install plumbing, heating, and electrical equipment in a Veterans' Home to be erected at Togus, Maine, while another contractor was to do the general work of preparing the site and constructing the building. Respondent agreed, for a stipulated price, to begin work upon notice to proceed and to finish by the time the work had been completed by the principal contractor. If respondent failed to complete the work within the time thus set, the government was entitled to terminate the contract or to require the payment of liquidated damages. The length of time allowed the principal contractor under his contract, subject to certain qualifications discussed below, was 250 days, and it was into this schedule that respondent was to coordinate his own activity.

The government gave notice to the general contractor to begin work on May 9, 1932. On May 12, respondent was notified to begin and early in June its superintendent arrived in Maine with tools and equipment. Upon his arrival he found that the general contractor had been stopped by the government because of the unexpected discovery of an unsuitable soil condition. It became necessary to change the site of the building and to alter the specifications, and because of the delay attendant upon preparing a new foundation, respondent was unable to begin work until October. As a consequence, overhead expenses accumulated during the period of delay, and much of the work which respondent's employees otherwise would have done either during warm weather or after the building was enclosed was done outside in cold weather.

Because of the delay and pursuant to the adjustment clauses of the contract the government extended the time of performance by respondent and because of structural changes, it re-adjusted the amount due. It increased payments to

[a] *H. E. Crook Company, Inc.* v. *The United States*, petition dismissed; 59 C. Cls. 593; affirmed 270 U. S. 4; 62 C. Cls. 749.

the principal contractor, reduced the payment to respondent by about $1,000 because of construction economies under the new plans, and waived any claim to liquidated damages for the period of the extension. The hospital was completed some months after it would have been finished had it not been for the change of plan.

The respondent was paid the full amount agreed on for the work it did. It then sued for about $26,000 for damages alleged to have been suffered due to delay for which the government was responsible. The Court of Claims held the government was liable for damages resulting solely from delay, but found that $13,600 of the alleged loss was due to respondent's own faulty estimate and financial conditions, and that $3,000 of it was caused by respondent's and the principal contractor's delays. Respondent sought no review of denial of this part of its claim. However, the court concluded that the balance claimed, $9,349, arose from overhead costs during the summer of 1932 when the new foundation was being prepared and from a decrease in labor effectiveness resulting because much of the work had to be done outside in cold weather. The judgment rendered under this conclusion is what we have before us.

The chief issues of the case are whether the delay in commencing the construction was a breach of contract by the government; whether, regardless of the answer to that question, respondent was entitled to an equitable adjustment for damages resulting from the delay, in addition to the extension of time already granted; and whether respondent is barred from any recovery because he failed to appeal certain decisions affecting his contract to the chief officer of the department. Under the view we take of the first two of these questions, it is unnecessary to answer the third.

I. The government contends, as it did in the *Crook* case, *supra*, that the change in specifications resulting in delay was not a breach of the contract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the government was required to do no more than grant an extension of time. Put another way, the government concedes that if an alteration of plan required respondent to use an extra 50 tons of steel, the government would be liable for the value of the steel and the cost of installation; but it argues that under the terms of this contract an extension of time should be accepted as full equitable adjustment for all damages caused by the fact that the work was done at the later period made necessary by the permitted change. Essentially it repeats the doctrine of *Chouteau* v. *United States*, 95 U. S. 61, 68: "For the reasonable cost and expenses of

the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made." [b]

We agree with this view. We do not think the terms of the contract bound the government to have the contemplated structure ready for respondent at a fixed time. Provisions of the contract showed that the dates were tentative and subject to modification by the government. The contractor was absolved from payment of prescribed liquidated damages, for delay, if it resulted from a number of causes, including "acts of Government" and "unusually severe weather." The government reserved the right to make changes which might interrupt the work, and even to suspend any portion of the construction if it were deemed necessary. Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work. Under these circumstances it seems appropriate to repeat what was said in the *Crook* case, that "When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *H. E. Crook Company, Inc.* v. *United States*, *supra*, 6. Decisions of this Court prior to the *Crook* case also make it clear that contracts such as this do not bind the government to have the property ready for work by a contractor at a particular time. *Wells Bros.* v. *United States*, 254 U. S. 83, 86; *Chouteau* v. *United States*, *supra;* cf. *United States* v. *Smith*, 94 U. S. 214, 217.[b]

As pointed out, the delay here resulted from a change in specifications made necessary by discovery of soil unsuitable for foundation purposes. The government having reserved the right to make such changes upon discovery of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated by the specifications," delays incident to the permitted changes cannot amount to a breach of contract. If there are rights to recover damages where the government exercises its reserved power to delay, they must be found in the particular provisions fixing the rights of the parties.

[b] *Charles P. Chouteau, survivor, etc.,* v. *The United States*, petition dismissed, 9 C. Cls. 155; affirmed, 95 U. S. 61; 13 C. Cls. 515.

Wells Bros. Co. of New York v. *The United States*, petition dismissed, no opinion, 54 C. Cls. 206; affirmed 254 U. S. 83; 56 C. Cls. 465.

Joseph Smith v. *The United States*, judgment for plaintiff, 11 C. Cls. 707; affirmed 94 U. S. 214; 12 C. Cls. 119.

II. Two of the Judges of the Court of Claims thought consequential damages resulting from delay were recoverable under paragraphs 4 and 3 of the contract. These paragraphs[1] deal with closely related problems. Article 3, entitled "Changes," governs the procedure under which the government may alter the specifications of the contract for general causes. Article 4, entitled "Changed Conditions," governs the procedure under which the government may alter the contract to meet unanticipated physical conditions. Article 4 incorporates by reference the same machinery of adjustment as that specified in article 3. Both clauses essentially provide that if changes are made affecting an increase or decrease of cost or affecting the length of time of performance, an equitable adjustment shall be made.

Clearly questions of interpretation in clauses so similar should, if possible, be resolved in the same fashion in each of them. Clause 4 was added to the standard form contract since clause 3, and we therefore turn first to decisions interpreting the latter clause. The Court of Claims, relying on principles announced in the *Chouteau*, *Wells*, and *Crook* cases, *supra*, has uniformly held that the "increase or decrease of cost" language in Sec. 3, and in similar clauses, is not broad enough to include damages for delay; that "It was never contemplated * * * that delays incident to changes would subject the government to damage beyond that involved in the changes themselves." *Moran Bros.* v. *United States*, 61 Ct. Cls. 73, 102; and for the same view, see *McCord* v. *United States*, 9 Ct. Cls. 155, 169; *Swift et al.* v. *United States*, 14 Ct. Cls. 208, 231; *Griffiths* v. *United States*, 74 Ct. Cls. 245, 255.

Were this a matter of first impression, we would again come to the same conclusion regarding this clause. It seems

[1] "Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * *

"Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration of price, and that "an increase or decrease * * * in the time required" should be met with alteration of the time allowed; for "increase or decrease of cost" plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision. The provision as to time serves the large purpose of removing from persons in the position of respondent liability for "delay" beyond the stipulated date for which it might otherwise have its contract terminated or might be required to pay liquidated damages without fault.

Despite the similarity of the two clauses, a minority of the court below has in this instance concluded that they may be distinguished and that respondent is entitled to damages for delay under clause 4. In supporting this view, respondents here rely primarily on *Rust Engineering Co.* v. *United States*, 86 Ct. Cls. 461, 475, where the court below distinguishes the two clauses by saying that the type of change contemplated in clause 4 is more basic than that under clause 3, and that therefore different liabilities should attach:

"The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made * * *"

And see *Sobel* v. *United States*, 88 Ct. Cls. 149, 165.

No such strained distinction between paragraphs 3 and 4 can stand. It does not help to argue that the changes made under clause 4 "are not within the contemplation of either party," since the changes made under clause 3 are also not contemplated in advance. Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract. For delays incident to such unanticipated changes, the contractor was under either section to be granted a "compensating extension of time." *Wells* v. *United States*, *supra*, 86.

In this case there were two consequences of the discovery that the Home could not be built as originally planned. One was an alteration of specifications, which resulted in slight cut in respondent's outlay and in his compensation. The

other was the delay itself and for this the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. Under the terms of the contract, it is entitled to no more. *Reversed.*

THE UNITED STATES, PETITIONER, v. CALLAHAN WALKER CONSTRUCTION COMPANY

[No. 43102]

[95 C. Cls. 314; 317 U. S. —]

Certiorari to review a decision of the Court of Claims holding that where a contract for construction of a levee on the Mississippi River provided that if any changes were made in the contract an equitable adjustment would be made and that in such case whether or not such adjustment was equitable was a question of law.

The decision of the Court of Claims was on November 9, 1942, *reversed*, the Supreme Court holding:

Under provisions of Government contract for construction of Mississippi River levee that if changes made caused an increase or decrease in amount due under contract or in time required for performance, an equitable adjustment should be made, and that all disputes concerning questions of fact should be decided by contracting officer subject to appeal to the head of department concerned, whose decision should be final, an "equitable adjustment" of additional payment for extra work performed in placing an enlarged false berm to remedy defect of subsidence of levee constructed involved merely the ascertainment of cost of digging, moving, and placing earth and the addition to that cost of the reasonable and customary allowance for profit, which elements concerned "questions of fact," and hence contractor who did not appeal to the head of department involved from the order of contracting officer could not recover from the Government additional costs over price paid for the extra work.

Mr. Justice ROBERTS delivered the opinion of the court as follows:

This case involves the meaning and application of the terms of a standard form of Government construction contract.

The findings of the Court of Claims may be summarized. In 1931 the War Department asked bids for the construction of a levee on the east side of the Mississippi River. The respondent bid 14.43¢ a cubic yard on a section of the work involving approximately 3,881,600 cubic yards of earthwork. A paragraph of the specifications reserved the right to make such changes in the work contemplated as might be necessary or expedient to carry out the intent of the contract or to meet unanticipated conditions, but added that no such modification would be the basis for a claim for extra compensation except as provided in the regular form of contract to be entered into between the parties.

The respondent began construction at the south end of the project and proceeded northward The length of the proposed levee was divided by stations one hundred feet apart and numbered from north to south. Sixty-eight per cent. of the construction between Station 5123 and Station 5113 had been completed when portions of the levee already constructed south of Station 5123 were found to have a tendency to subside. For this reason the Government contracting officer, on October 7, 1932, ordered the work stopped between the two stations while he sought to determine the cause of the subsidence. He concluded that the placing of an enlarged false berm, not called for in the original specifications, would prevent subsidence in the sector between the two stations. On October 18th he gave respondent a written order to construct such a berm; the order stated that respondent would be given one hundred per cent. credit for the earth placed south of Station 5123 where the subsidence had occurred and that payment for additional yardage required by the false berm would be made at the contract price per cubic yard. The additional yardage involved was about 64,000 cubic yards. The work covered by the change order was necessary for the completion of the project. The order was issued against the respondent's protest that an extra price should be allowed as the additional work would cost the respondent more than 14.43¢ per cubic yard, and that the order was not within the terms of the contract. The respondent asserted it would later present a claim for extra cost occasioned it by the additional work.

Article 3 of the standard form of construction contract signed by the parties provides:

"Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due

under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. . . . Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

Article 15 provides:

"Article 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed."

The respondent did not appeal from the order of the contracting officer to the head of the department concerned. After completion of the work, the acceptance of the Government's final payment was under protest. Thereafter respondent brought this action for its additional costs over the price of 14.43¢ paid it for the extra work and was awarded a recovery by the court below.

The Government's defense was that, under the terms of the contract, the contracting officer's decision as to what was an equitable adjustment involved only a question of fact and that if the respondent was dissatisfied with the officer's judgment the contract limited further recourse to an appeal to the department head. The court below overruled the contention by a vote of 3 to 2, one of the judges in the majority writing a separate opinion. (95 C. Cls. 314.) Two of the judges were of opinion that the contracting officer paid no attention to Art. 3 of the contract, made no adjustment, and, without considering the possibility of extra costs involved in the extra work, simply ruled that the contract price applied to it.

We cannot accept this view for several reasons. In the first place, there are no findings to support it. The findings show that the officer gave the matter consideration, reached a decision about it, and issued the order which gave respondent a credit to which it might not have been entitled under the contract, and fixed the rate of 14.43¢ per cubic

yard for the extra yardage required by the change in the specifications. There are no findings that the contracting officer failed to ascertain the probable cost of the new work or that he did not honestly decide that the contract price would be a fair allowance for the extra work. If the conflict between the opinion and the findings were sufficient to require a remand for clarification this is obviated in the present instance by certification of the evidence which supports the following conclusions. Between October 7th, the date of the stop order, and October 18th, the date of the change order, the respondent's officials were in touch with the area engineer and the contracting officer, represented that there was not sufficient earth in the borrow pit opposite the sector in question but that the earth would have to be brought from other points, and that the contract price of 14.43¢ would be insufficient to compensate for the additional expense involved. The Government's representatives disagreed with the contentions. Prior to October 18th, however, after talking with the contracting officer, respondent's officials signified that they would proceed with the work as ordered, keep a careful record of the work done and its cost, and would later insist on payment of any cost greater than that specified by the change order.

All three judges who were in the majority below agreed, as an alternative ground of decision, that if what the contracting officer did constituted his notion of an equitable adjustment, he was wrong; and the respondent was right in its claim that the adjustment made was unfair and inequitable. To the Government's insistence that the question was one of fact and, therefore, to be settled finally by appeal to the department head, in accordance with Art. 15 of the contract, the court below replied that this court, in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, held that what constitutes an equitable adjustment is not a question of fact but a question of law. In this view they held that Art. 15 was inapplicable; that the contracting officer having erred in his construction of the contract had thereby breached its terms, and the respondents were entitled to sue for the amount of damage incurred by that breach.

The decisions cited are not authority for the principle that what is fair and equitable is always a question of law. Quite the contrary. In § 77B of the Bankruptcy Act it was provided that the court should confirm a plan of reorganization if satisfied "it is fair and equitable" and does not discriminate unfairly in favor of any class of creditors or stockholders. We held that, in this connection, the phrase "fair and equitable" had become a term of art, that

Congress used it in the sense in which it had been used by the courts in reorganization cases, and that whether a plan met the test of fairness and equity long established by judicial decision was not a question to be answered by the creditors and stockholders but by the court as a matter of law.

An "equitable adjustment" of the respondent's additional payment for extra work involved merely the ascertainment of the cost of digging, moving, and placing earth, and the addition to that cost of a reasonable and customary allowance for profit. These were inquiries of fact. If the contracting officer erroneously answered them, Article 15 of the contract provided the only avenue for relief.

The judgment is reversed.

ALEX RANIERI v. THE UNITED STATES

[No. 42851]

[*Ante*, p. 494; 317 U. S. —]

Government contract; Mississippi River levee; misrepresentation as to conditions not established.

Decided February 2, 1942; judgment for defendant on counterclaim. Plaintiff's motion for new trial overruled June 1, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court December 14, 1942.

INDEX DIGEST

BANKHEAD COTTON ACT OF 1934.

I. Where a common law business trust, of which plaintiffs are trustees, purchased tax exemption certificates issued under the Bankhead Cotton Act (48 Stat. 598), which act imposed a tax upon the amount of cotton ginned and moved into commerce from the 1934–1935 crop in excess of a stipulated number of bales; and where tax exemption certificates to cover the stipulated number of bales were issued by the Secretary of Agriculture to cotton producers; and where such tax exemption certificates were negotiable and were traded in among cotton producers and through a pool of such certificates established for that purpose by the Secretary of Agriculture; and where said business trust purchased such certificates by check payable to the pool manager; and where such tax exemption certificates so purchased were surrendered by said business trust to the Collector of Internal Revenue in payment of the ginning tax on cotton; it is *held* that plaintiffs' allegations are insufficient to establish an obligation on the part of the United States by way of a contract, either express or implied in fact, within the provisions of section 145 of the Judicial Code (U. S. Code, Title 28, section 250). *Lee Wilson & Company*, 443.

II. The Government collected no tax in connection with the issuance of the tax exemption certificates; the proceeds did not go into the general fund of the United States Treasury. *Id.*

CONTRACTS—Continued.

IX. Where the contract provided that in the employment of labor preference should be given to citizens "who are *bona fide* residents of ------------ the county in which the work is to be performed;" and where the work to be performed was in Greene County, Ohio, 10 or 15 miles from Xenia, Greene County, and approximately the same distance from Dayton and Springfield, each in a different county; and where the defendant required that the contractor give preference not only to labor in Greene County but also to labor in the contiguous counties of which Dayton and Springfield were the principal cities; and where much of the labor so obtained was inefficient and indolent, resulting in excess labor costs; it is *held* that the contract required the contractor to give preference to labor from Greene County only and when this labor supply was exhausted the contractor had the right to secure its labor from any place in the State of Ohio, and plaintiff is accordingly entitled to recover. *Id.*

X. Where it is established with sufficient definiteness that damage has been caused by the wrongful act of the other party to a contract the party injured will not be deprived of recovery because the amount of the damage cannot be definitely ascertained. *The F. Mansfield & Sons Co.* v. *United States*, 94 C. Cls. 397, and cases therein cited. *Id.*

XI. Where plaintiff, a contractor, in response to the invitation of defendant, submitted a bid for the construction work in connection with the extension and remodeling of the United States Post Office and Court House at Quincy, Illinois; and where said bid was accepted on April 3, 1936, and the contract entered into between plaintiff and defendant, providing for completion of contract within 300 calendar days after receipt of notice to proceed; and where such notice to proceed was not received by plaintiff until August 17, 1936; it is *held* that in the circumstances of the instant case there was no unreasonable delay for which the defendant can be held legally responsible and plaintiff is not entitled to recover. *Barnes*, 60.

XII. Where before work could be commenced under the contract between plaintiff and defendant for

CONTRACTS—Continued.

XXVIII. Where plaintiff, a contractor, on May 31, 1935, in response to defendant's invitation for bids, submitted its bid for the construction of Bayou Fordoche-Lottie Levee on the Mississippi River; and where said bid, dated May 20, 1935, contained the required clause stating that the bidder was complying with and would continue to comply with each approved Code of Fair Competition to which it was subject under the National Industrial Recovery Administration Act and the President's Agreement as to hours and wages; and where the bid price was not inserted in plaintiff's bid until May 30, 1935; and where Title I of the National Industrial Recovery Administration Act, providing for said Codes of Fair Competition, was declared unconstitutional by the Supreme Court on May 27, 1935 (*Schechter Poultry Corporation* v. *United States*, 295 U. S. 495); and where plaintiff did not comply with the minimum wage and maximum hour provisions of such code applicable to its industry; it is *held* that plaintiff was not bound by the contract to pay any specific minimum wage and is accordingly entitled to recover its excess costs for the performance of the contract resulting from the enforced compliance with said requirements of the code. *Dameron & Kenyon, Inc.*, 133.

XXIX. When the *Schechter* case was decided, the Codes of Fair Competition became legally ineffective. *Id.*

XXX. In the instant case, it is *held* that the evidence submitted is adequate to determine the difference between the wages in fact paid by the plaintiff and the prevailing wages which would have been paid by the plaintiff without coercion by the defendant. *Id.*

XXXI. Where plaintiff, in response to defendant's invitation, bid upon and was awarded the contract for the construction of the post office building at Reading, Pa.; it is *held* that plaintiff is entitled to recover for:

(1) The value of a "diner" restaurant building which plaintiff was led to believe, by the drawings, plans and specifications, plaintiff would be allowed to remove as salvage but which was removed by another, to whom said diner belonged;

CONTRACTS—Continued.

(2) The cost of excavating a large part of the area covered by a three-story brick building on the site, the drawings showing that the said area had been excavated but which had not been so excavated;

(3) The extra cost of excavating rock found within a part of the area of excavation for the new building, an unexpected condition for which plaintiff was entitled to extra compensation under the contract. *Ruff*, 148.

XXXII. Where there was an error in the street numbers of the existing buildings as given on the drawing furnished by the defendant; it is *held* that the defendant is bound by the meaning which plaintiff reasonably gathered from the defendant's writings and plaintiff is entitled to recover for the salvage value of the diner for which plaintiff had made allowance in estimating the amount of his bid. *Id.*

XXXIII. Where the drawing furnished by defendant indicated that the area of the three-story building on the site had already been completely excavated; and where an examination of the area, though carelessly made, by plaintiff's excavation subcontractor did not disclose a contrary condition; and where plaintiff's bid, based on such drawing and examination, did not contemplate the necessity for excavating under a considerable part of said building; it is *held* that plaintiff is entitled to recover for the cost of the additional excavation. *Id.*

XXXIV. Where an erroneous statement is made in such circumstances that it has the natural effect of misleading the person to whom it is addressed, its consequences are not to be removed by a caveatory admonition made elsewhere. *Id.*

XXXV. Where the contract provided that all disputes concerning questions of fact were to be decided by the contracting officer, subject to appeal to the head of the department, whose decision was to be final; and where with respect to soil conditions encountered in excavating there is no evidence that anyone who took part in the negotiation of the contract, on either side, anticipated the condition that was actually

CONTRACTS—Continued.

L. Where plaintiff's claim was presented to the proper authorities and denied; and where the action of said authorities was neither arbitrary nor capricious; it is *held* that plaintiff is not entitled to the remission of the amount assessed as liquidated damages. *Id.*

LI. Where plaintiff by contract with the Government undertook to build 3.528 miles of road in Hot Springs National Park in Arkansas, to furnish all labor and materials and to perform all work in grading and surfacing said road in accordance with drawings and specifications; and where plaintiff alleges breach of contract by defendant, uncompensated changes in construction requirements, damages for delay and unpaid balance; it is *held* that considerable extra work was done but the evidence is conflicting and certain of the claims are indefinite. *McGlone*, 507.

LII. Where it is indicated by the evidence that certain excavation work done by plaintiff was worth more than the compensation paid; and where plaintiff did not pursue the method plainly laid down in the contract to establish whatever rights he may have had; it is *held* that plaintiff is not entitled to recover additional compensation for this work. *Id.*

LIII. Where due to alignment and other changes by the defendant, the plaintiff excavated 4,010 cubic yards of rock more than would have been required by the original contract plans; and where such a change was authorized by the terms of the contract; and where plaintiff was paid therefor at the rate stipulated in the contract for cuts and fills, regardless of classification; and where no other price was agreed upon and plaintiff did not protect his rights by pursuing the method set out in the contract; it is *held* that plaintiff is not entitled to recover any additional amount for this work. *Id.*

LIV. Where the lot upon which the borrow pit was located was purchased and paid for by the plaintiff with the approval of the District Engineer, defendant's authorized representative, who had declined pursuant to the contract to permit plaintiff to secure material from any

RENTAL OF PROPERTY BY GOVERNMENT.

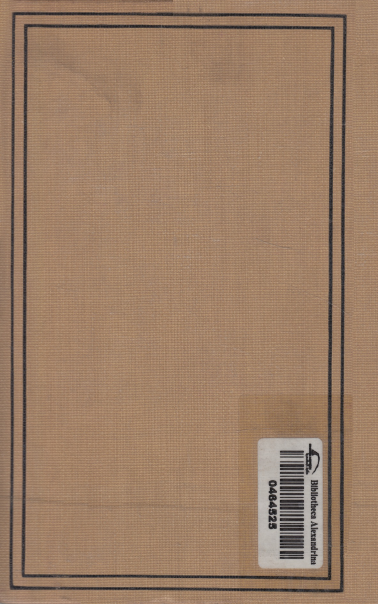
I. Where plaintiff in March 1936 purchased a six story office building in Oklahoma City, Oklahoma, which was then being used by the Federal Works Progress Administration and its affiliated State and local agencies, under an arrangement by which the City of Oklahoma City paid the rental, as permitted by law; and where in December 1936 a written lease was entered into by the plaintiff and the United States which provided that the defendant should pay an additional sum as rental, estimated to be sufficient to cover liability insurance; and where said lease contained the usual provision for restoring the premises to the same condition as existed at the time of the making of the lease, reasonable and ordinary wear and tear excepted; and where said building was, after notice, vacated by the defendant's agencies on September 30, 1938; and where it is established by the evidence that during the period of occupancy the building and equipment were damaged in many ways and in removal of the agency and its equipment further and unnecessary damage was done to the building; it is *held* that plaintiff is entitled to recover compensation for the restoration cost on account of the damages in excess of ordinary wear and tear that were caused during the period of plaintiff's ownership and defendant's occupancy and to recover for the rental on the building for the period during which it was actually occupied by defendant after rental payments had ended. *Elizabeth Smith*, 326.

II. Where the rental contract called for written notice more than 30 days prior to the termination of the lease contract that the owner would require restoration; it is *held* that such provision for notice can be waived, and was in fact waived in the instant case by conversations between defendant's representatives and plaintiff respecting repairs to be made. *Id.*








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